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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-935

FRANK SCHERE; JACOB BLACK; ANNA BLACK; DAVID ROBINSON; LILLIAN ROBINSON; LAWRENCE COHEN; BARBARA COHEN; and SALLY TANNENBAUM

vs.

TOWNSHIP OF FREEHOLD,

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Petition for Certiorari	1
Opinions Below	2
Constitutional Provisions Involved	3
Jurisdiction	4
Questions Presented	5
Statement of Facts	6
Reasons for Granting the Writ	10
1. The appellate court below was in error in finding the municipal zoning ordinance to be an unconstitutional confiscation of the plaintiff's property	10
2. The decision of the appellate court below is in clear conflict with established federal and state precedents regarding judicial interference in legislative determinations	18
Conclusion	23

CASES CITED:

Causby v. United States, 328 U.S. 256 (1946)	11, 16
Central Lumber Co. v. South Dakota, 226 U.S. 157 (1912)	18
Columbia Basin Orchard v. United States, 132 F. Supp. 707 (1955)	13
Collins v. Board of Adjustment of Margate City, 3 N.J. 200 (1949)	14

TABLE OF CONTENTS

CASES CITED: Page

Confederation De La Raza Unido v. City of Morgan Hill,
324 F. Supp. 895 (D.C. 1971) 22

Creasey v. Stevens,
160 F. Supp. 404 (D.C.W.D. Penna., 1958) 13

Fanale v. Hasbrouck Heights,
26 N.J. 323 (1958) 19

Gant v. Oklahoma City,
289 U.S. 98 (1933) 18

Goldblatt v. Town of Hempstead,
369 U.S. 590 (1962) 13, 17

Griggs v. Allegheny County,
369 U.S. 84 (1962) 11

Grubel v. Mac Laughlin,
286 F. Supp. 24 (D.C.V.I. 1968) 18

Hadacheck v. Sebastian,
239 U.S. 394 (1915) 12, 16

Hudson County Water Company v. McCarter,
209 U.S. 104 (1911) 11

Interstate Consolidated State Railway v. Massachusetts,
207 U.S. 79 (1907) 11

Johnson v. Township of Montville,
109 N.J. Super. 511 (App. Div. 1970) 19

Kozesnik v. Montgomery Township,
24 N.J. 154 (1957) 14

TABLE OF CONTENTS

Page

CASES CITED:

Lamm v. Volpe,
449 F.2d 1202 (U.S.C.A. 10th Cir. 1971) 17

Livingston Township v. Marchev,
85 N.J. Super. 428 (1964) 14

Midtown Properties, Inc. v. Madison Township,
68 N.J. Super. 197 (1961) 14

Monmouth Junction Mobile Home Park, Inc. v.
South Brunswick Township,
107 N.J. Super. 18 (1969) 14

Mugler v. Kansas,
123 U.S. 623 (1887) 10, 16

Otis v. Parker,
187 U.S. 606 (1903) 18

Pennsylvania Coal Co. v. Mahon,
260 U.S. 393 (1922) 11

Peterson v. Palisades Park,
127 N.J.L. 190 (1941) 19

Robertson v. City of Salem,
191 F. Supp. 604 (D.C. Or. 1961) 18

Rock Hill v. Chesterfield Township,
Burlington County,
23 N.J. 117 (1957) 14

Rockaway v. Rockaway Township,
38 N.J. Super. 468 (App. Div. 1955) 14

United States v. Central Eureka Mining Co.,
357 U.S. 155 (1958) 11

TABLE OF CONTENTS

Page

CASES CITED:

United States v. Kansas City Life Insurance Co., 339 U.S. 799 (1950) 11

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 12, 17

Yara Engineering Corp. v. City of Newark, 132 N.J.L. 370 (1945) 14

Zahn v. Board of Public Works of Los Angeles, 274 U.S. 325 (1927) 18

STATUTES CITED:

N.J.S.A. 40:55-30 15

N.J.S.A. 40:55-32 15

28 U.S.C. § 1257(3) 4

CONSTITUTIONS CITED:

N.J. Const. Art IV, sec 6, para. 2 ..... 3, 15

United States Const., Amendment V 3

Appendix A

Opinion of the Monorable Andrew A. Salvest, Judge of the Superior Court of New Jersey 1a

Appendix B

Opinion of the Superior Court of New Jersey, Appellate Division as of Docket No. A-429-71 .... 21a

Appendix C

Zoning Ordinance of the Township of Freehold .. 25a

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. ——

FRANK SCHERE; JACOB BLACK; ANNA BLACK; DAVID ROBINSON; LILLIAN ROBINSON; LAWRENCE COHEN; BARBARA COHEN; and SALLY TANNENBAUM

vs.

TOWNSHIP OF FREEHOLD,

Petitioner.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

PETITION FOR CERTIORARI

The Petitioner, TOWNSHIP OF FREEHOLD, prays that a writ of *certiorari* issue to review the opinion and judgment of the Appellate Division, Superior Court of the State of New Jersey rendered in these proceedings on June 23, 1972.

OPINIONS BELOW

The opinion of the Law Division, New Jersey Superior Court, is unreported and appears at Appendix A, *infra.*, pp. 1a-20a. The opinion of the Appellate Division, New Jersey Superior Court, 119 N.J. Super. 433 (1972), appears at Appendix B, *infra.*, pp. 21a-24a. A Petition for Certification was denied by the New Jersey Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V, in applicable part states:

> ". . . nor shall private property be taken for public use, without just compensation."

Article IV, Section 6, Paragraph 2, New Jersey Constitution:

> "The Legislature may enact general laws under which municipalities, other than counties, may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings and structures, according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land, and the exercise of such authority shall be deemed to be within the police power of the State. Such laws shall be subject to repeal or alteration by the Legislature."

JURISDICTION

The judgment of the Supreme Court of the State of New Jersey denying the Defendant's appeal and Petition for Certification was entered on September 21, 1972. This Petition for *Certiorari* was filed less than ninety (90) days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether a zoning ordinance duly adopted by a municipality acting pursuant to a constitutional grant of police power represents a confiscatory taking of the property of a landowner without just compensation as required by the Fifth Amendment to the U.S. Constitution.

2. Whether the Appellate Court below was acting in contravention of clearly established precedents when it intervened in the zoning dispute.

STATEMENT OF FACTS

The Plaintiffs in this case are the owners of two large tracts of land located in Freehold Township, Monmouth County, New Jersey. Their land is situated in an area of the Township that had been zoned for one-family residential development on lots of 40,000 square feet. On June 4, 1969, the Plaintiffs, in a consolidated action, brought suit in the Superior Court of New Jersey, Law Division, Monmouth County. The Plaintiffs alleged that the Zoning Ordinance in question violated statutes of the State of New Jersey and provisions of the Constitution of the State of New Jersey and of the United States of America.

Specifically, the Plaintiffs maintained that the Ordinance was arbitrary, discriminatory, confiscatory, and, therefore, unconstitutional. The gist of the Plaintiffs' case was that the Zoning Ordinance in question so restricted the use and development of Plaintiffs' property that it was in fact a confiscatory taking of said property without just compensation as required by both the New Jersey and United States Constitutions.

On August 18, 1971, Judge Andrew A. Salvest, Law Division, Superior Court of New Jersey, decided the matter adversely to the Plaintiffs. The Court found that the ordinance involved was not confiscatory of the Plaintiffs' property. Judge Salvest found that the zoning ordinances had been adopted by the Defendant municipality acting in the public interest and with a view to promoting the general welfare.

The Plaintiffs subsequently appealed to the Superior Court, Appellate Division. In their Appellate brief, the Plaintiffs once again charged that the zoning ordinance in question was illegal, discriminatory, confiscatory, unrea-

sonable, arbitrary, and violative of the Constitutions of the State of New Jersey and of the United States. On June 23, 1972, the judgment of the Appellate Division was entered, and it reversed the Law Division's holding. The Appellate Court held that the one-acre zoning (40,000 square feet) requirement of the Defendant Township rendered the Plaintiffs' land beyond practical, reasonable utilization and was, therefore, "confiscatory." The Defendants appealed to the Supreme Court of New Jersey. The Petition for Certification was denied September 21, 1972.

The federal questions sought to be reviewed here were first raised by the Plaintiffs in their initial Complaint filed in the Superior Court of New Jersey, Law Division, Monmouth County. Point No. 10 of that Complaint stated:

> "Said ordinance and amendment thereto in divers other ways violate the statutes of the State of New Jersey and the provisions of the Constitution of the State of New Jersey and the provisions of the Constitutions of the State of New Jersey and of the United States of America."

This same point was raised in the Amended Complaint filed by the Plaintiffs. The constitutional question was raised again by the Plaintiffs in their Pretrial Memorandum. Section 3 of their Memorandum, under "Factual and Legal Contentions of Plaintiff," specified:

> "The aforesaid ordinance and amendment thereto adopted May 26, 1969, insofar as they placed part or all of Plaintiffs' premises in R-40 zone are illegal, discriminatory, confiscatory and arbitrary and violate the Constitutions of the State of New Jersey and of the United States."

The federal issue was raised in the trial briefs of both the Plaintiffs and Defendant. The question of confiscatory taking was passed upon by the trial judge in his opinion. Judge Salvest found that the zoning ordinance in question was not confiscatory of Plaintiffs' land and was not in any manner illegal. He found the regulation to be a legitimate exercise of the police power of the municipality.

The federal question involved in this case was raised by the Plaintiffs in their appellate level brief. It was the position of the Plaintiffs:

> 1. That the April 12, 1971 ordinance, as applied to the premises of the Plaintiffs, is illegal, discriminatory, confiscatory, unreasonable, arbitrary and violates the Constitutions of the State of New Jersey and of the United States; higher restrictions have been placed upon said premises although no changes have taken place to justify imposition thereof; said restrictions are not reasonably adapted to accomplish the purposes for which zoning is permissible; said restrictions are imposed without reasonable consideration being given to the prior existing character of the area, its suitability for particular purposes, the conservation of property value or the most appropriate use of land throughout Defendant Township.

The Plaintiffs' contentions were rebutted by the Defendants in their appellate level brief:

> "The ordinance adopted April 12, 1971, is not arbitrary, discriminatory, confiscatory or unconstitutional and was adopted for the purposes for which zoning is permissible."

On June 23, 1972, the Superior Court, Appellate Division, entered judgment in favor of the Plaintiffs. The

Court's decision held that the Township Zoning Ordinance was invalid because it was *confiscatory*.

The Defendants in their Petition for Certification to the Supreme Court of New Jersey stated:

> ". . . it was and is the position of the municipality that the ordinance was not arbitrary, discriminatory, confiscatory or unconstitutional. . ." At page 1, Petition for Certification.

The Defendant's appeal and Petition for Certification to the Supreme Court of New Jersey were denied September 21, 1972.

REASONS FOR GRANTING THE WRIT

1. The appellate court below was in error in finding the municipal zoning ordinance to be an unconstitutional confiscation of the plaintiff's property.

As was noted above, the Appellate Court's decision was based on the following:

> "We are satisfied from an examination of the whole record that the large parcels of land owned by the respective Plaintiffs are, in very substantial degree, rendered beyond practical, reasonable utilization under the restriction thereof by the Zoning Ordinance of one-family residential development to lots of a minimum of 40,000 square feet or about one acre (R-40.)" (Appendix B p. 1.)

The Appellate Court felt that this R-40 zoning represented an unconstitutional confiscation of the Plaintiffs' property. In reaching this conclusion, the Appellate Court was in conflict with standards established by the United States Supreme Court and lower Federal courts.

The question before the Court is, when does an exercise of "police power" by a governmental subdivision so interfere with the rights of the landowners that it becomes a "taking" or "confiscation" under the Fifth Amendment? The standards used by the Supreme Court to determine questions of this nature were developed by the first Justice Harlan and later by Justice Holmes. The Harlan theory was most clearly articulated in the landmark case of *Mugler v. Kansas*, 123 U.S. 623 (1887). In *Mugler*, the Court denied compensation to the owner of a brewery who had been put out of business by prohibition legislation. The Court stated that for a "taking" under the Fifth Amendment to occur, the government must assert a "pro-

prietary" interest in the property, it must take the property for its own use, it must be an exercise of "eminent domain." The application of the Harlan theory is demonstrated in some fairly recent cases. In *Causby v. United States*, 328 U.S. 256, 266 (1946), the Court stated:

> "It is the character of the invasion, not the amount of damage resulting from it, . . . that determines the question whether it is a taking."

This theory was also used in *United States v. Kansas City Life Insurance Co.*, 339 U.S. 799 (1950); *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958); and *Griggs v. Allegheny County*, 369 U.S. 84 (1962).

The second operative theory in the area of police power and the Fifth Amendment was that developed by Mr. Justice Holmes. The paramount issue in Justice Holmes' mind was the extensiveness of the economic harm inflicted upon the landowner by the regulation. In *Interstate Consolidated State Railway v. Massachusetts*, 207 U.S. 79, 87 (1907), he stated, "(T)he question narrows itself . . . to the magnitude of the burden imposed. . . ." In *Hudson County Water Company v. McCarter*, 209 U.S. 104, 110 (1911), he said that while the Government may properly diminish values somewhat under the police power, if the exercise of that power makes the affected property "wholly useless, the right of property would prevail over the other public interest, and the police power would fail." The most famous articulation of this principle occurred in the case of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

The Court found that a Pennsylvania statute which forbade the mining of anthracite coal in such way as to cause the subsidence of any structure used as a "human

habitation" so diminished the value of the Plaintiff's property that it represented a "taking" of the property in question.

The Holmesian approach was one of balancing the needs of society against the rights of the property owner. The decision as to when a legitimate exercise of the "police power" of the State ends and a Fifth Amendment "taking" begins was to be deterimned by the individual facts of each case. The Holmesian approach was an attempt at a pragmatic resolution to a problem which had become increasingly important as the government expanded its use of the "police power."

Under the Holmes test, the question that arises is, what degree of economic diminution would be tolerated by the Court before a Fifth Amendment "taking" would occur? This question can be answered by an examination of the relevant cases.

In *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), the Petitioner was the owner of a tract of land upon which he manufactured bricks. The land was rezoned for residential development by the municipality. It was a finding of fact by the Court that this rezoning reduced the value of the land by 87 1/2 per cent, *Id.* at 405, yet compensation was refused because no "taking" was found by the Court. The Court found this rezoning to be a legitimate exercise of "police power" of the community.

A similar set of circumstances occurred in the landmark case of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). In *Euclid*, the Appellee was the owner of a tract of land, the value of which was reduced by 75 per cent by the municipality's enactment of a comprehensive zoning regulation. The Court upheld the municipal Zoning Ordinance and found it to be a legitimate exercise of the "police power." The Court stated:

> "A zoning ordinance must be clearly arbitrary and unreasonable and without substantial relation to public health, safety, morals, or general welfare before it can be declared unconstitutional." *Id.* at 370.

In *Euclid*, as in *Hadacheck*, the diminution in value of the property was not found substantial enough to be confiscatory.

In *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), the Appellant's excavating business was *completely destroyed* by a municipal zoning ordinance that favored residential development. In *Goldblatt*, the Supreme Court of the United States stated that a legislative restriction is not to be viewed as a "taking" merely because it "completely prohibits a beneficial use to which the property has previously been put." *Id.* at 592.

In all of the above cases, the Court was presented with extreme circumstances and yet did not find the zoning ordinances in question to be unconstitutional "takings" nor confiscatory. The conclusion that can be drawn from these cases is that for a zoning ordinance to constitute a "taking," the situation must be *extremely* unfair to the landowner, and the ordinance must be discriminatory and arbitrary.

The vitality of these two tests is witnessed by their continued application in lower Federal courts. In *Columbia Basin Orchard v. United States*, 132 F. Supp. 707 (1955), the United States Court of Claims applied the Harlan test when it held that in order to constitute a "taking" of property, there must have been an *intent* on the part of the government *to take* the owner's property. In *Creasey v. Stevens*, 160 F. Supp. 404, 410 (D.C.W.D. Penna., 1958), the Court applied the Holmes test when it stated:

> ". . . though property may be regulated to a certain extent under the police power, if the regulation goes too far it will be recognized as a 'taking' for which compensation must be paid."

In New Jersey, the courts have approached the question of when an exercise of "police power" becomes an exercise of "eminent domain" and, therefore, confiscatory in much the same way as the Federal courts. Zoning in New Jersey is an exercise of the "police power" of a municipality, *Rock Hill v. Chesterfield Township, Burlington County*, 23 N.J. 117 (1957), *Midtown Properties, Inc. v. Madison Township*, 68 N.J. Super. 197 (1961), *Livingston Township v. Marchev*, 85 N.J. Super. 428 (1964), *Monmouth Junction Mobile Home Park, Inc. v. South Brunswick Township*, 107 N.J. Super. 18 (1969). New Jersey courts have held that if municipal zoning ordinances are reasonably related to the problems of the community, there is not a "taking" of property without compensation in the constitutional sense. *Rockaway v. Rockaway Township*, 38 N.J. Super. 468 (App. Div. 1955), *Collins v. Board of Adjustment of Margate City*, 3 N.J. 200 (1949). However, a zoning restriction against all use of realty has been found "confiscatory" and beyond the police power of the municipality. *Kozesnik v. Montgomery Township*, 24 N.J. 154 (1957). In the case of *Yara Engineering Corp. v. City of Newark*, 132 N.J.L. 370, 372 (1945), the New Jersey Supreme Court found that a zoning ordinance which limited the height of buildings in a certain area so destroyed the value of the property that it became a "taking." In this case, the Court found that the city acquired a proprietary interest in the land by way of the zoning regulations. The Court stated:

> "The city may not under the guise of an ordinance acquire rights in private property which it may only

> acquire by purchase or by the exercise of its power of eminent domain."

This determination by the Court represents a clear application of the Harlan test.

It is the contention of the Defendants in the instant case that the Appellate Court was in error in finding the municipal Zoning Ordinance to be an unconstitutional confiscation of the Plaintiffs' property. An application of either the Harlan test or the Holmes test to the facts of the instant case reveals that the zoning regulation in question did not expropriate the Plaintiffs' property, nor did it so diminish the value of said property as to constitute a "taking."

The Zoning Ordinance in question here was duly enacted by the municipality pursuant to a grant of power by the State Constitution and State Legislature. The 1947 Constitution of the State of New Jersey, Article IV, Section 6, Paragraph 2, states:

> "The Legislature may enact general laws under which municipalities, other than counties, may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings and structures according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land, and the exercise of such authority shall be deemed to be within the police power of the State. Such laws shall be subject to repeal or alteration by the Legislature."

As a result of this authority, the Legislature enacted *N.J.S.A.* 40:55-30 *et seq.*, which set forth the general purposes and powers to be used by governing bodies when zoning a municipality. *N.J.S.A.* 40:55-32 sets forth the purposes of zoning and reads as follows:

> "Such regulations shall be in accordance with a comprehensive plan and design for one or more of the following purposes: to lessen congestion in the streets; secure safety from fire, flood, panic and other dangers; promote health, morals or the general welfare; provide adequate light and air; prevent the overcrowding of land or buildings; avoid undue concentration of population. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view of conserving the value of property and encouraging the most appropriate use of land throughout such municipality. As amended L. 1964, c. 150, § 1."

The Zoning Ordinance in question recited as its purpose all of the above-quoted points and included the following:

> ". . . provide a well balanced and stable economic structure, control rate and direction of growth. . ."

The Plaintiffs below maintain that this Ordinance was confiscatory and unconstitutional because R-40 zoning would be more difficult to develop and sell than houses built on smaller R-20 and R-25 lots. Nowhere do the Plaintiffs maintain that the municipality was exercising a "proprietary interest" in their land. Consequently, the Harlan test as enunciated in *Mugler, supra, Causby, supra,* and the other cases listed previously cannot be satisfied by their claim.

Neither do the Plaintiffs claim that R-40 zoning would in any way diminish their land value. Even if there was some diminution in the value of their property, the Plaintiffs would be hard pressed to show the loss required to convert an exercise of "police power" into an unconstitutional Fifth Amendment "taking." In the instant case, there was no 87 1/2 per cent depreciation as in *Hadacheck, supra,*

nor even a 75 per cent depreciation as in *Euclid, supra.* Nor was there a "bald suppression" of a pre-existing business as occurred in *Goldblatt, supra.* All the Plaintiffs allege here is that homes built on R-40 lots would be more expensive and that there is a greater market for homes constructed on R-20 and R-25 lots. The only proof offered for these contentions are statements of opinion not based on any empirical data. Given these circumstances, it appears that the Appellate Court was in error in finding an unconstitutional taking under the Fifth Amendment of the United States Constitution. The evidence viewed in the light of the cases and doctrines outlined above clearly indicate that the Appellate Court misinterpreted the meaning of the term "confiscatory."

As noted by the Court in *Lamm v. Volpe*, 449 F.2d 1202, 1203 (U.S.C.A., 10th Cir. 1971):

> "Police power should not be confused with eminent domain, in that the former controls the use of property by the owner for the public good, authorizing its regulation . . . whereas the latter takes property for public use and compensation is given for property taken, damaged or destroyed."

The facts in the instant case clearly indicate that this was an exercise of the police power by the municipality and not an exercise of eminent domain.

As was shown previously, the Ordinance in question here was enacted pursuant to a legitimate grant of police power. It was enacted for a legitimate enumerated purpose. It neither "took" the Plaintiffs' land for use by the municipality nor did it diminish the value of the property. Thus, neither the Harlan nor the Holmes tests were satisfied. Therefore, the Appellate Court's decision was erroneous and in clear conflict with the established precedents at both the State and Federal levels.

2. The decision of the appellate court below is in clear conflict with established federal and state precedents regarding judicial interference in legislative determinations.

The enactment of a zoning ordinance is an exercise of the "police power" and is legislative in character. *Central Lumber Co. v. South Dakota*, 226 U.S. 157 (1912); *Otis v. Parker*, 187 U.S. 606 (1903). It is established law that there is a strong presumption in favor of the validity of a legislative enactment. *Grubel v. MacLaughlin*, 286 F. Supp. 24 (D.C.V.I. 1968); *Robertson v. City of Salem*, 191 F. Supp. 604 (D.C. Or. 1961).

> "The burden of proof, therefore, is upon the party who assails the validity of such an ordinance to establish that it does not and will not promote the safety, order, convenience, prosperity and general welfare." *Dennis v. Village of Tonka Bay*, 156 F.2d 672, 674 (C.C.A. 8th Cir. 1946).

If there is room for fair debate as to the validity of a municipal ordinance, the Court will not substitute its own judgment for that of the legislature. *Gant v. Oklahoma City*, 289 U.S. 98 (1933); *Zahn v. Board of Public Works of Los Angeles*, 274 U.S. 325 (1927).

> "A Court in construing a zoning law will not set aside the determination of the legislature unless it is *clear* that the law is an arbitrary or irrational exercise of power having no substantial relation to the public health, morals, safety or general welfare." *Grubel v. MacLaughlin*, *supra*, at p. 31.

> "Fairly debatable questions as to the reasonableness, wisdom and propriety of an ordinance are not for determination of the courts but for that of the legislative body on which rests the duty and responsibility of

> the decision." *City of St. Paul v. Chicago, St. P., M. & O. Ry. Co.*, 413 F.2d 762, 767 (8th Cir. 1969).

This same legal philosophy has been manifested by New Jersey courts. In the case of *Peterson v. Palisades Park*, 127 N.J.L. 190, 193 (1941), the Appellate Court stated:

> "There is a presumption in favor of the validity of the action of the local authority, and the burden is on the landowner to establish by evidence that [it] is arbitrary."

In *Fanale v. Hasbrouck Heights*, 26 N.J. 323 (1958), the New Jersey Supreme Court noted that if the issue before a municipality's governing body in a zoning matter is "fairly debatable," the judiciary *could not* quarrel with the result. These same doctrines were forcefully reaffirmed in the 1970 case of *Johnson v. Township of Montville*, 109 N.J. Super. 511 (App. Div. 1970).

In *Johnson*, the Court stated that a presumption exists that a municipal governing body acts reasonably and that resulting legislation is valid. The Court also held that a court may not pass upon the wisdom of a particular ordinance and that *debatable* issues or questions of policy must be resolved in favor of the municipality. Finally, the Court held that the judiciary may interfere with a zoning ordinance *only when* the presumption of validity is overcome by an affirmative showing of evidence by the aggrieved party. It is the Defendant's contention in the instant case that the Appellate Division Court strayed from these well established principles when it interposed its own judgment for that of the municipality and declared the zoning ordinance in question to be invalid.

The ordinance in question was duly enacted by the municipality. Its purpose was to provide a well balanced

and stable economic structure for the Township and to provide for an orderly growth pattern (Appendix C). The adoption of this comprehensive zoning plan was made necessary by the rapid and unforeseen population expansion that Freehold Township experienced during the last 12 years. As of May 1971, the Township's population was estimated at 14,000. This figure, supplied by the Monmouth County Planning Board, was well in excess of the 10,400 figure projected by that same body for the year 1990. This means simply that the Township's population was 25 years in advance of all estimates. This rapid population expansion made it imperative that the Township develop a plan for the orderly growth of the community.

The enactment of the Zoning Ordinance here in question was prompted by a legitimate desire to insure the general population that municipal services such as fire and police protection, water, sewerage, and educational facilities would be available and would be of acceptable quality. In short, this ordinance was designed to protect the quality of life in the Township for all residents. It was enacted after much careful consideration, discussion, and debate. It was not capricious, arbitrary, or unjust.

In opposition to these legitimate considerations, the Plaintiffs contend that this ordinance is arbitrary, discriminatory, and *confiscatory*. Their contentions are based on a *belief* that the Township's Zoning Ordinance will make their property harder to develop because there exists a greater market for homes built on R-20 and R-25 lots than for homes built on R-40 lots. The Plaintiffs contend that homes built on R-40 lots would be difficult to develop because they would be priced between $45,000.00 and $50,000,000. They maintain there is no market for homes built in this price range. These contentions must be examined in light of relevant statistical information.

In August of 1971, the Monmouth County Planning Board issued a report on housing. The information contained in this report was compiled by the Planning Board and based in part on the results of the 1970 national census. The *Housing* study indicated that between 1960 and 1970, the population of Freehold Township increased by 175%. There was an increase of 138% in the number of available housing units. With the population increasing at a greater rate than the available housing supply, the housing shortage situation already extant in 1960 was exacerbated. The report predicted a continued increase in the demand for housing in all price ranges.

The Planning Board also noted that the cost of construction of new homes had risen by 40% per square foot during the 1960-1970 decade. This point was dramatically illustrated by the fact that the median value of in-county homes had risen by 82% between 1950 and 1970. In 1950, the median value of single-family dwelling units in Monmouth County was $9,409.00. By 1970, the median value had risen to $26,417.00. The increased median value was caused in part by the fact that 15% of the single-family dwelling units in the county in 1970 were priced between $35,000.00 and $50,000.00 and that 6% were worth more than $50,000.00.

The preceding statistical information casts doubt on the validity of the Plaintiffs' contentions. The conclusions that can be drawn from the aforementioned housing study are that there is a housing shortage in the County and that the demand for new homes in all price ranges far exceeds the supply. Given this statistical information, the best that can be said of the Plaintiffs' contentions is that they are debatable.

As was noted above, there is a presumption in favor of the validity of a legislative enactment. Those challeng-

ing an enactment bear the burden of proof. If there is room for debate as to the validity of an enactment, the Court will not substitute its own judgment for that of the enacting legislative body.

In the present case, the doubt surrounding the Plaintiffs' contentions dictated that the Appellate Court refrain from substituting its judgment for that of the municipality. When the Court chose to ignore this legal mandate, it acted in clear contravention of established precedents. As was noted by the Federal District Court in the case of *Confederation De La Raza Unido v. City of Morgan Hill*, 324 F. Supp. 895 (D.C. 1971), a court should interfere with the judgment of local authorities in zoning matters only in the *most extreme* cases and under the most extreme circumstances.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Certiorari should be granted.

Respectfully submitted,

/s/ John A. Kaye
JOHN A. KAYE
Counsel for Petitioner

December 4, 1972.

Appendix A

OPINION OF THE HONORABLE ANDREW A. SALVEST, JUDGE OF THE SUPERIOR COURT OF NEW JERSEY
(Dated August 18, 1971)

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64 West Main Street
Freehold, New Jersey 07728

RE: Black, et als v. Township of Freehold
Docket No. L 32525-68 P.W.
Cohen, et als v. Township of Freehold
Docket No. L 32526-68 P.W.

Gentlemen:

This matter came before the court by way of Complaint in lieu of prerogative writ to set aside amendments to the Zoning Ordinance.

The plaintiffs in the within consolidated suit are owners of land situated in a zone created by the amended Zoning Ordinance enacted on May 26, 1969. Originally the land was situate in a Residential A Zone, which required a 20,000 square foot lot size with a 100 foot width. On May 24, 1965, an interim ordinance was adopted increasing the square footage to 40,000 with a 200 foot width. This amendment was subsequently amended August 22, 1966 to include a 160 foot depth. Both amendments referred to a nonexistent October 2, 1963 ordinance. (Original

ordinance amended by these changes was enacted October 2, 1953.)

A short history concerning zoning ordinances in the Township might be informative. The original ordinance was adopted October 2, 1953. This ordinance created six zones as shown on the Zoning Map of Freehold Township, Monmouth County, New Jersey, 1953". Most residential acreage was placed in Residential A Zone wherein minimum lot area was 20,000 square feet with a 100 foot width. The premises in question were placed in said Residential A Zone.

The first amendment of said original ordinance was adopted February 25, 1965, and affected only uses prohibited in the Industrial E Zone. A further amendment was adopted May 24, 1965, and which is referred to as the interim ordinance, pending completion of the necessary studies and the adoption of appropriate standards to be included in a proposed new comprehensive zoning ordinance for the Township.

This interim ordinance included a requirement that no lot area therein be less than 40,000 square feet, and no lot width or depth less than 200 feet. Exceptions were for existing B-1 Residential Zone. This ordinance described the ordinance of which it purported to be an amendment as adopted and approved October 2, 1963. The record shows that no ordinance was adopted October 2, 1963. (Original ordinance adopted October 2, 1953.)

On May 21, 1965, two additional amendments were adopted which involved factors concerning commercial and industrial zones. On May 24, 1965, a further amendment was adopted affecting the industrial and commercial zones. On June 14, 1965, the ordinance was amended affecting location of filling stations. December 27, 1965,

the ordinance was amended placing certain specified areas formerly situated in the Residential A Zone in the Industrial E Zone, among other things.

February 28, 1966, ordinance was amended rezoning certain premises from Commercial D Zone to Residential A Zone. April 25, 1966, ordinance amended affecting Commercial D or Highway Development. May 23, 1966, ordinance amended affecting Commercial D or Highway Development Zone. August 22, 1966, ordinance amended to provide for minimum lot width of 200 feet and minimum lot depth of 160 feet in Residential A Zone. September 22, 1966, ordinance amended affecting Industrial E Zone. October 10, 1966, ordinance amended to define terms "Home Occupation" and "Home Professional Occupations," among other things. April 22, 1968, ordinance amended removing certain properties from Residential A Zone and placing them in Industrial E Zone.

January 13, 1969, introduced and passed on first reading what purported to be a comprehensive revision of the original Zoning Ordinance heretofore amended and supplemented. This ordinance finally adopted on May 26, 1969, and placed the properties in question in the R-40 Residential Zone. However, part of the Wardell tract was placed in the R-25 Residential Zone. On March 10, 1969, an amendment was introduced which placed the entire Wardell tract in the R-40 Zone and which was finally adopted on May 26, 1969.

While this action was pending, and in March of 1971, the proposed ordinance introduced January 13, 1969, and as the same was amended and supplemented by the amendment introduced March 10, 1969, and two other subsequent amendments not here pertinent, was introduced and passed on first reading and on April 12, 1971, was adopted.

The plaintiffs attack all of these actions commencing with the adoption of the interim ordinance down to and including the ordinance adopted April 12, 1971 as the ordinance affects the properties in question.

The ordinance adopted on May 26, 1969, was a comprehensive revision of the original zoning ordinance and it perpetuated the 40,000 foot requirement established by the interim ordinance in some areas and reduced it to 25,000 feet in others. The latter reduction was designed to affect those lands which had received preliminary subdivision approval. The May 26, 1969 ordinance recited all of the purposes of zoning which are contained in N.J.S.A. 40:55-32 but also includes the following recital:

". . . provide a well balanced and stable economic structure; control rate and direction of growth; . . ."

Depositions which were taken from a member of the Planning Board and Township Committee indicate by their testimony that these latter purposes were the main reason the ordinance was enacted. The plaintiffs contend that the ordinance is void because its purpose is to tie up land by the use of large lot sizes until the governing body determines that the town can economically absorb additional people and also that the interim ordinance is void because it purports to amend a nonexisting ordinance.

Plaintiffs contend that since the ordinance was motivated by the Township's desire to control growth, it is void because none of the purposes of zoning enumerated in N.J.S.A. 40:55-32 sets forth the purposes of zoning and essential considerations and reads as follows:

"Such regulations shall be in accordance with a comprehensive plan and designed for one or more of the following purposes: to lessen congestion in the streets; secure safety from fire, flood, panic and other dangers;

promote health, morals or the general welfare; provide adequate light and air; prevent the overcrowding of land or buildings; avoid undue concentration of population. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view of conserving the value of property and encouraging the most appropriate use of land throughout such municipality. As amended L.1964, c.150, § 1."

However, it appears clear that a municipality may utilize the zoning power to promote the general welfare which is an enumerated purpose. In this context, it has been held that a municipality may zone with the intent of reaping economic benefit by stimulating industrial rather than residential development, thus relieving the tax burden and school congestion by increasing tax ratables and reducing the incoming population. Gruber v. The Mayor and Township of Raritan, 39 N.J. 1, 9 (1962).

A municipality may strike a balance favorable to homeowners between residential and industrial uses in order to obtain a sound municipal economy. Newark, etc. Cream Co. v. Parsippany-Troy Hills Township, 47 N.J. Super. 306, 328 (L.D. 1957). The court stated:

"Is a zoning classification based upon such a purpose and intent a valid exercise of zoning power? I think it is. Zoning is one aspect of the sovereign police power. Such power is not limited to measures directly needful to serve the public health, morals and safety. It may also be invoked to serve the public convenience and general prosperity and well-being. Mansfield and Swett, Inc. v. West Orange, supra, 120 N.J.L., at page 153; Pierro v. Baxendale, 20 N.J. 17,

at page 28 (1955). The essence of zoning is to provide a balanced and well ordered scheme for all activity deemed essential to the particular municipality. Berdan v. City of Paterson, 1 N.J. 199, 205 (1948); Kozesnik v. Township of Montgomery, 24 N.J. 154 (1957). Subject to the rule of reason, the kind of community and the kind of balance is exclusively a mater for local legislative determination. Duffcon Concrete Products v. Borough of Cresskill, 1 N.J. 509 (1949). I conclude that a zoning scheme seeking balanced land use to obtain a sound municipal economy by encouraging industry on which taxes may be levied to help meet the deficit in the cost of municipal services to home owners is a proper exercise of the zoning power, subject always to the reasonableness of the classification and regulations enacted to achieve the end both generally and with respect to particular property."

Neither of these purposes are specifically enumerated in N.J.S.A. 40:55-32 yet both have been held to be within the general welfare portion of the statute.

Considering that minimum lot size restrictions are valid exercises of municipal power, (Fischer v. Township of Bedminster, 11 N.J. 194 [1952]), it seems reasonable that a municipality may reasonably use this device to insure its economic well-being by controlling the rate of its growth. This conclusion is especially compelling when one considers that minimum lot sizes by their very nature retard growth. In this regard, we cite Harrington Glen, Inc. v. Municipal Board of Adjustment, Borough of Leonia, et al, 52 N.J. 22, 32 (1968):

"(6, 7) All of the cited cases recognized, as do our own, the long-since settled doctrine that reasonable

zoning regulations designed to promote the orderly physical development of a municipality according to a land use pattern represent a valid exercise of police power. Of course, such regulations, by establishing districts wherein land may be devoted only to the ordinary incidents of ownership. But the restrictions are not offensive constitutionally because when reasonable in degree and, in the judgment of the governing body, necessary to the physical harmonious growth of land use in the municipality, they serve the overall public interest of the community."

I have reviewed the testimony and the submissions in an effort to determine whether or not the evidence supports plaintiffs' conclusion that the Township merely intended to tie up land by the use of large lot sizes.

Plaintiffs in presenting their case, relied on the testimony of a former Mayor, Mr. Marzulli; a Mr. Schlessinger, agent for the plaintiff Schere, Mr. Kovacs, a professional engineer, land surveyor and professional land planner, Mr. Lazarus, a real estate appraiser, a Mr. Sussna, planning and zoning consultant, a Mr. Halsey, Director of Planning, Monmouth County Planning Board, Mr. Schwartz, a former Mayor, member of the Township Committee and member of the Planning Board for one year, Mr. Wood, former Chairman of the Planning Board, and Mr. Blatchley, former member of the Planning Board and former Committeeman.

The defense called Mr. Smith, a member of the Township Committee since January 1, 1969, and Mr. Oross, a professional city planner.

It is noted that Mr. Marzulli, Mr. Schwartz and Mr. Blatchley were not office holders at the time of the trial of this case. It is further noted that the testimony of these

individuals does not and cannot be accepted by the court as the official view of either the Planning Board or the Township Committee. It is further noted that the plaintiffs, at no time, availed themselves of the opportunity to call as witnesses the other members of the Planning Board or of the Township Committee as they were constituted at the time of the enactment of the interim ordinance, the amendments thereto, the introduction of the January 1969 ordinance and its final passage, nor at the time of the enactment of the April 12, 1971 ordinance or any of the amendments or supplements thereto.

The court recognizes that

> "While it may be true that the voluntary statements and authorized acts of its officials do not bind a municipality, State v. Giller, 5 N.J. Super. 130, 132 (App. Div. 1949), nevertheless extra-official statements of municipal officials have been considered in assaying the purpose of ordinances." Glen Rock, etc. v. Board of Adjustment, etc. Glen Rock, 80 N.J. Super. 79, 89 (1963)

Mr. Marzulli expressed the feeling that it was not feasible to zone the tracts in question R-40. He did state that during the various discussions that there were two schools of thought, those who favored the R-20 and those who favored the R-40. He did tell about the continuous meetings which were held in connection with the preparation of the Zoning Ordinance and that when the vote was taken on May 26, 1969, he though that they were all voting on a comprehensive zoning plan and that he voted in the affirmative.

Mr. Schwartz felt it was not feasible to zone the properties in question R-40 because of their location. It was

brought out, however, that Mr. Schwartz did not vote on either the interim ordinance or on the April 12, 1971 ordinance.

Mr. Wood did not quite recall what his recommendations were for the tract in question. He can't remember whether it was R-20, R-25 or R-40-30. He did state, however, that they left the tracts in question in R-40 because they considered that the overall ordinance was the important thing. He further stated that he does not know if there was an intention to change the R-40 zoning in connection with tracts in question at some later time.

Mr. Blatchley was a former member of the Planning Board and a member of the Township Committee. His testimony was that it was the intention at the time of the adoption of the interim ordinance in 1965 to give the Township time to come up with a final zoning plan although, he added, zoning is never final. The overall purpose was to develop into a cummunity. His first choice for the Buck tract owned by Mr. Schere was to place it entirely in the Industrial Zone. His next choice was to place it in R-40. He also stated that the Township, at the time, experienced severe problems servicing the development that was already taking place. He also expressed concern with availability of sewerage facilities and other utilities.

He pointed out that approximately 300 Certificates of Occupancy were issued each year and that there is a backlog of 800 or 900 lots in the R-20, R-25 area. He further pointed out that the expert witness, Sussna, who was called by the plaintiffs in this case, appeared at a previous meeting and vehemently objected to increase from R-20 to R-25 zoning, and stated that it would stifle the growth of the Township.

The fact of the matter is, and the court finds it so, that with the upgrading of lot sizes from R-20 to R-25, the community experienced very rapid growth.

Mr. Halsey, the Director of Planning of Monmouth County, supported this finding. He cited from the Master Plan, P-6 in evidence, at page 3, Table 1, which deals with the population projection for the years 1960-1990. The 1970 projection was 6100 to 6450. The 1980 projection, 7300 to 8400; the 1990 projection, 8100 to 10,400. In fact, the population as of May 1971, for the Freehold Township area was 14,000 which indicates that the population growth was 25 years in advance of the population projection estimated in the Master Plan. Mr. Halsey offered an expert opinion that zoning such as we are dealing with here to slow growth, is a valid reason; to prevent growth, is invalid, and with these reasons, the court agrees.

Nowhere in the testimony or the submissions do I find any testimony to support the conclusion that the Township Committee acted to tie up land as contended by the plaintiffs.

I have also taken note of the testimony of the expert witnesses who had been called by the plaintiffs, and have taken their testimony into consideration. I note that none of these experts state that the present zoning will in any way diminish the land values immediately adjoining. The experts uniformly agree that there is a greater market for R-20 and R-25 lots and they feel that R-40 lots will not move. They do not, however, deny that it is feasible to build one-family homes on R-40 lots but they seek to deprecate same on the ground that such houses would have to sell in the fifty thousand dollar category.

I have reviewed requirements relating to the square footage of one-family houses on R-40 tracts and do not find

them to be onerous. I completely reject the testimony of Mr. Sussna and any of the other witnesses called by the plaintiffs wherein they declare R-40 zoning as it relates to their land to be confiscatory. The statements that have been made are not based on any surveys or other data, but merely constitute categorical statements which in my opinion are utterly unsupported.

I have considered further, the overall testimony and the submissions and have come to a conclusion that the members of the Planning Board, members of the Township Committee, and the various consultants which they employed and the various committees that played a part, all worked together with a sincere and serious intent to produce a comprehensive zoning ordinance which would eventuate into the creation of a balanced community and would best serve the public interests and contribute to the general welfare.

The plaintiffs further contend that their particular lands are unsuited for the permitted uses. They claim that no reasonable consideration was given to the character of the district created and its particular suitability for the new use. If this were true, and that the land could not be reasonably used for the permitted use, the ordinance would, of necessity, fall. However, as a matter of fact, I find that there is insufficient evidence before me upon which to find that the land is, in fact, unsuited for the permitted uses. Plaintiffs completely ignore the fact that the present use of the land, and the use it was put to before and after the interim ordinance, is still the use at present.

It further is a fact that while the property was zoned R-20, no applications for subdivision were made by either of the plaintiffs or anyone on their behalf down to the time of this trial.

They give as their reasons for such failure to apply, that it was uneconomical to build one-family houses heretofore. This, of course, constitutes no reason insofar as this action is concerned.

It is also my opinion that based on the testimony that as the population continues to expand, and there is less competition from the outstanding R-20 and R-25 lots, that the demand for R-40 lots will increase in the same manner that the demand for R-25 lots experienced great demand after being upgraded from R-20 lots. I based this upon the testimony offered by Mr. Halsey. He stated that Freehold Township will continue to experience rapid growth between now and 1985. That, in fact, the population of the Township would triple and he projected the following figures: 1968, 10,080; 1985, 32,000; the year 2,000, 65,000. This represents a percentage increase of population between 1968 and 1985 of 217.5 percent and between 1985 and 2000, 103 percent. It appears reasonable, therefore, for me to assume that the demand for R-40 lots will increase in proportion to the pressures of the population growth.

The plaintiffs further contend that the ordinance is discriminatory because it treats land similarly situated differently by imposing a 25,000 square foot minimum based on no real physical difference. The law requires that different classes be based on real differences related to the purposes for which the classes are formed. Rockhill v. Chesterfield Township, 23 N.J. 117, 126 (1957).

In the case at bar, where one of the purposes of the zoning is to control growth, it seems reasonable in effectuating this purpose to draw the line at a point where no development has yet taken place or where no commitment to develop has been made. This, despite the fact that these other lands have characteristics similar to those restricted.

The plaintiffs further contend that the entire scheme envisioned by the Township is void. Plaintiffs allege that the municipality intends to maintain those lots, unreasonably zoned R-40, undeveloped, until such time as new development can be economically absorbed. Then it will reduce the lot size requirements on an individual basis.

I did not find that the evidence was of such nature as to permit me to find this to have been the intention of the Township Committee. It is noted that the ordinance, on its face, fails to disclose this plan. Whether such wrongdoing will occur in the future is, at best, speculative and should not affect the validity of the ordinance. The variance procedure, by its nature, gives room for abuse. Yet, this potential has never in New Jersey formed a basis for a successful attack on an ordinance.

Plaintiffs contend that Rockhill v. Chesterfield Township, supra, prohibits this type of zoning. In Rockhill, however, the scheme invalidated reserved the entire Township for agricultural and residential uses, and then created special uses placed according to local discretion without regard to districts. This unlawful "spot zoning" was apparent from the ordinance as enacted, and depended for its invalidity not on the projected intent of municipal officials, but on the very ordinance itself.

The plaintiffs contend that a lapse of nearly four years between the time an interim ordinance was enacted and the time it is replaced by the comprehensive zoning ordinance renders it void, especially where the final product is so similar to the interim ordinance. An interim ordinances validity with respect to time is measured with reference to the requirements needed to formulate the plan giving rise to the comprehensive zoning ordinance. Deal Gardens, Inc. v. Board of Trustees of Loch Arbour, 48 N.J. 492, 500 (1967).

I have already indicated heretofore my view as to the intent of the members of the Planning Board and the municipal governing body in promulgating the ordinance in question. I will also at this time find, based on the evidence which is most ample in this regard, as to the very many meetings which were attended by the persons involved, the resort to expert assistance such as that of Mr. Halsey, now Director of Planning for Monmouth County, and others, the many special meetings which the participants attended which I feel reasonably justifies the passage of time between the interim ordinance and the May 1969 ordinance and the ordinance of April 12, 1971.

It is further plaintiffs' intention that the interim ordinance is void because it purports to amend a nonexistent 1963 ordinance. I find it beyond doubt and crystal clear that the drafters intended to refer to the basic 1953 ordinance, there being none other.

Research by my staff, counsel, and myself, it appears, failed to unearth any other case in New Jersey in which this specific question has arisen. However, it is clear that when constituting a statute where words have been omitted through inadvertance and the legislative intent is ascertainable, the court can supply the missing word. Publix Asbury Corp., Inc. v. City of Asbury Park, 18 N.J. Super. 286 (L.D. 1952), affirmed 18 N.J. Super. 192 (App. Div. 1952). Also, a court can repunctuate a statute in reaching for its intention. Application of Walter Marvin, Jr., 97 N.J. Super. 62 (App. Div. 1967), affirmed 53 N.J. 147. It, therefore, seems reasonable that the court can change the erroneous date to the proper date especially where the true intent is so patently clear.

I feel it would be helpful to examine the respective duties and obligations placed upon all of the litigants in these cases. The authority to enact a zoning ordinance is

stated in the 1947 Constitution of the State of New Jersey in Article 4, Section 6, paragraph 2, as follows:

> "The Legislature may enact general laws under which municipalities, other than counties, may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings and structures, according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land, and the exercise of such authority shall be deemed to be within the police power of the State. Such laws shall be subject to repeal or alteration by the Legislature."

The Legislature enacted N.J.S.A. 40:55-30, et seq., which sets forth the general purposes and powers to be used by governing bodies in zoning their municipalities. The judicial role was explained in Harvard Enterprises, Inc. v. The Board of Adjustment of the Township of Madison, 56 N.J. 362. Justice Schettino, speaking for the court at page 368, says:

> "Preliminarily, it should be noted that the judicial role in reviewing a Zoning Ordinance is tightly circumscribed. There is a strong presumption in favor of its validity, and the Court cannot invalidate it, or any provisions thereof, unless this presumption is overcome by a clear showing that it is arbitrary or unreasonable. Morris v. Postma, 41 N.J. 354. 359 (1964); Napierkowski v. Gloucester Tp., 29 N.J. 481, 492 (1959); Zampieri v. River Vale Tp., 29 N.J. 599, 605-606 (1959); Bogert v. Washington Tp., 25 N.J. 57, 62 (1957)."

It is also clear that a Judge may not interfere merely because he would have made a different policy decision

if the power to decide had been his in connection with a specific zoning ordinance passed by a governing body. The court can concern itself only with an abuse of delegated legislative authority and plaintiffs must sustain the burden in such a situation, and it is a heavy burden. United Advertising Corp. v. Borough of Metuchen, 42 N.J. 1 (1964).

And further, in Johnson v. Township of Montville, 109 N.J. Super. 511, 519 (App. Div. 1970) the following guidelines are provided:

"In sum, we may interfere only when the presumption in favor of the ordinance is overcome by an affirmative showing that it is arbitrary or unreasonable in the light of the standards prescribed by N.J.S.A. 40:55-32; Kozesnik v. Montgomery Tp., supra, 24 N.J., at 167. The burden of proof is upon plaintiffs. Fischer v. Bedminster Tp., 11 N.J. 194, 204 (1952). That burden is a heavy one. Ward v. Scott, 16 N.J. 16, 23 (1954); Vickers v. Tp. Comm. of Gloucester Tp., supra, 37 N.J. at 242; Ward v. Montgomery Tp., supra, 28 N.J. at 539.

"Plaintiffs principally base their contention, that the action of the municipal governing body was unreasonable, arbitrary and capricious, upon the fact that it was not in accordance with a comprehensive plan and did not receive adequate consideration by the planning board.

"The basic requisites of a comprehensive plan are set forth in Kozesnik v. Montgomery Tp., supra, as follows:

"There has been little judicial consideration of the precise attributes of a comprehensive plan. Haar, 'In

accordance with a Comprehensive Plan,' supra (68 Harv. L. Rev. 1154). Our own decisions emphasize that its office is to prevent a capricious exercise of the legislative power resulting in haphazard or piecemeal zoning. Speakman v. Mayor and Council of Borough of North Plainfield, 8 N.J. 250, 256 (1951); Raskin v. Town of Morristown, 21 N.J. 180, 198 (1956). Without venturing an exact definition, it may be said for present purposes that 'plan' connotes an integrated product of a rational process and 'comprehensive' requires something beyond a piecemeal approach, both to be revealed by the ordinance considered in relation to the physical facts and the purposes authorized by R.S. 40:55-32. Such being the requirements of a comprehensive plan, no reason is perceived why we should infer the Legislature intended by necessary implication that the comprehensive plan be portrayed in some physical form outside the ordinance itself. A plan may readily be revealed in an end-product—here the zoning ordinance—and no more is required by the statute.

"The comprehensive plan embraced by an original zoning ordinance is of course mutable. If events should prove that the plan did not fully or correctly meet or anticipate the needs of the total community, amendments may be made, Hochberg v. Borough of Freehold, 40 N.J. Super. 276 (App. Div. 1956), and if the ordinance as thus amended reveals a comprehensive plan, it is of no moment that the new plan so revealed differs from the original one."

I find as a fact, that, in the case before me, the plaintiffs have failed to present proofs showing that the actions of the municipal body were arbitrary or unreasonable, in the light of the standard N.J.S.A. 40:55-32.

I further find that the zoning ordinance promulgated and adopted in May of 1969, and as enacted together with amendments on April 12, 1971, on its face, demonstrates it to be a comprehensive plan and had received more than adequate consideration by the Planning Board and the municipal governing body.

I have already indicated that amount of effort expended by the official bodies in considering the ordinance. I also find it to be a fact that the ordinance is not what is generally referred to as a freeze out ordinance. That there is sufficient evidence to indicate that the ordinance is mutable, depending on the developing circumstances.

The case of Gruber v. Mayor and Township Committee of Raritan Township, 39 N.J. 1 (1962) deals with a similar situation as is now before us, and the court states at page 9:

"It is to be noted that within the borders of the statutory language, the zoning power may be exercised to promote the general welfare, a term which has received very broad definition in our state. See Pierro v. Baxendale, 20 N.J. 17, 28 (1955). In their efforts to create a better economic balance in the Township by stimulating industrial rather than residential development, Township officials were seeking to advance the public welfare by alleviating the heavy tax burden and the harmful school congestion. So long as this was being done reasonably as part of and in furtherance of a legitimate comprehensive plan for the zoning of the entire municipality, it fell within the terms of R.S. 40:55-32. See Ward v. Montgomery Tp., 28 N.J. 529, 535 (1959); Newark etc. Cream Co. v. Parsippany-Troy Hills Twp., 47 N.J. Super. 306, 328 (Law Division 1957); cf. Rockaway Estates v. Rockaway Tp., 38 N.J. Super. 468, 477 (App. Div. 1955); Greenway

Homes v. River Edge, 137 N.J.L. 453, 456 (Sup. Ct. 1948).

"In Ward v. Montgomery Tp., supra, the court, in rejecting an attack on an ordinance as arbitrary, unreasonable and capricious, had this to say through Justice Francis:

"The conclusion is inescapable that the township was hungry for tax revenue. Manifestly, its fiscal picture was such that a new source of income would serve the general economic welfare. Pursuit of that objective was entirely worthy of the attention of th municipal fathers. And its achievement through land use regulation will not warrant judicial condemnation as long as it represents an otherwise valid exercise of the statutory zoning authority. If the amendment of the ordinance is compatible with and furthers a legitimate comprehensive plan for the zoning of the municipality within the contemplation of the statute, N.J.S.A. 40:55-32, it is legally unobjectionable. The fact that increased tax revenue is intended to result therefrom, or that an individual property owner may be benefited incidentally does not justify a charge of perversion of power. Kozesnik v. Montgomery Tp., supra; Collins v. Board of Adjustment of Margate City, 3 N.J. 200 (1949); Rockaway Estates v. Rockaway Tp., 38 N.J. Super. 468 (App. Div. 1955); Greenway Homes v. Borough of River Edge, 137. N.J.L 453, 456 (Sup. Ct. 1948). 28 N.J. at pp. 535, 536."

The defendant urges that the plaintiffs failed to exhaust their administrative remedies and that, therefore, this case should be dismissed on account of such failure. I feel, that considering all of the circumstances, the case

should be decided on its merits. Deal Gardens, Inc. v. Board of Trustees of the Village of Loch Arbour, 48 N.J. 492 (1967).

After considering all of the testimony, the submissions and the arguments of counsel, I find as a fact, in addition to what I have said heretofore, that the plaintiffs have failed to sustain their contentions as required by the authorities I have cited above.

I further find that the ordinances involved herein are not unreasonable, arbitrary, capricious or in any other wise illegal. They are not discriminatory because the properties in question are treated the same as all other unexcepted propertry. I also find that the ordinances are not confiscatory of the plaintiffs' lands and I have already stated my reasons therefor.

I further find that the ordinances under attack are comprehensive ordinances and in keeping with the requirements of N.J.S.A. 40:55-30 et seq. and with the interpretations of that Statute, as indicated by the citations heretofore, and that the ordinances, as a matter of fact, demonstrate that they were enacted in the public interest and with a view of promoting the general welfare.

Therefore, in view of the fact that the plaintiffs have failed to sustain their contentions by the quantum of proof required, I hereby dismiss the complaints.

Counsel for defendant will submit an order in accordance with the foregoing.

Very truly yours,

/s/ Andrew A. Salvest
ANDREW A. SALVEST
Judge, Superior Court

AAS/hs

Appendix B

OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION AS OF DOCKET NO. A-429-71

Argued June 12, 1972—Decided June 23, 1972

Before Judges Conford, Matthews and Fritz.

On appeal from Superior Court, Law Division, Monmouth County.

Mr. William R. Blair, Jr. argued the cause for appellants (Messrs. Parsons, Canzona, Blair & Warren, attorneys).

Mr. John A. Kaye argued the cause for respondent.

PER CURIAM.

We are satisfied from an examination of the whole record that the large parcels of land owned by the respective plaintiffs are, in very substantial degree, rendered beyond practical, reasonable utilization under the restriction thereof by the zoning ordinance of one-family residential development to lots of a minimum of 40,000 sq. ft., or almost an acre (R-40).

One of these tracts is 200 acres in area and the other is 100. Aside from one-family residences, these properties were restricted under the ordinance as of April 12, 1971, to farming, and, by way of special use exception, to garden apartments or planned adult communities. On September 27, 1971 the ordinance was amended to exclude garden apartments. On this appeal we are controlled by the current status of the ordinance. While plaintiffs might perhaps be required to attempt to devote at least part of their lands to the planned adult community use (if they can qualify therefor under the ordinance) before pleading

confiscation, it certainly would not be reasonable to require them to resort to use of all of these large parcels for such a special purpose before complaining of a plainly unreasonable zoning requirement in relation to the most natural current and prospective utilization of such substantial aggregations of land in a rapidly growing community and area—single-family residential development.

Strong and convincing evidence in the form of expert testimony and otherwise was adduced by plaintiffs demonstrating that these tracts were not feasibly developable for residences on 40,000 sq. ft. lots—which would entail selling prices of $50,000 and up. No comparable residential development abuts or is near either tract. Instead, there are surrounding uses for either industrial purposes, 25,000, 20,000 and 9,000 square-foot residential developments, or vestigial farming operations, with an expressway imminently projected for one side of the Wardell tract. There was no contradiction by any of defendant's witnesses of the fact that these properties were not developable for one-acre residences in the reasonably foreseeable future. A prognostication by one defense witness that when all the land now zoned for 25,000 square-foot development is used up (whenever that will be) there will then ensue a demand for homes on 40,000 square-foot lots in the township seems to us sheer speculation, unrooted in any rational explanation based upon evidence.

The opinions of the plaintiffs' experts outlined above are strongly buttressed by the history, amply portrayed in the record, leading to the adoption of these zoning amendments. This indicates that the governing body's adoption of the restriction here involved was designed to inhibit residential development in the municipality at a rate which would outstrip what the town fathers thought the voters and taxpayers would accept in fiscal outlay to supply

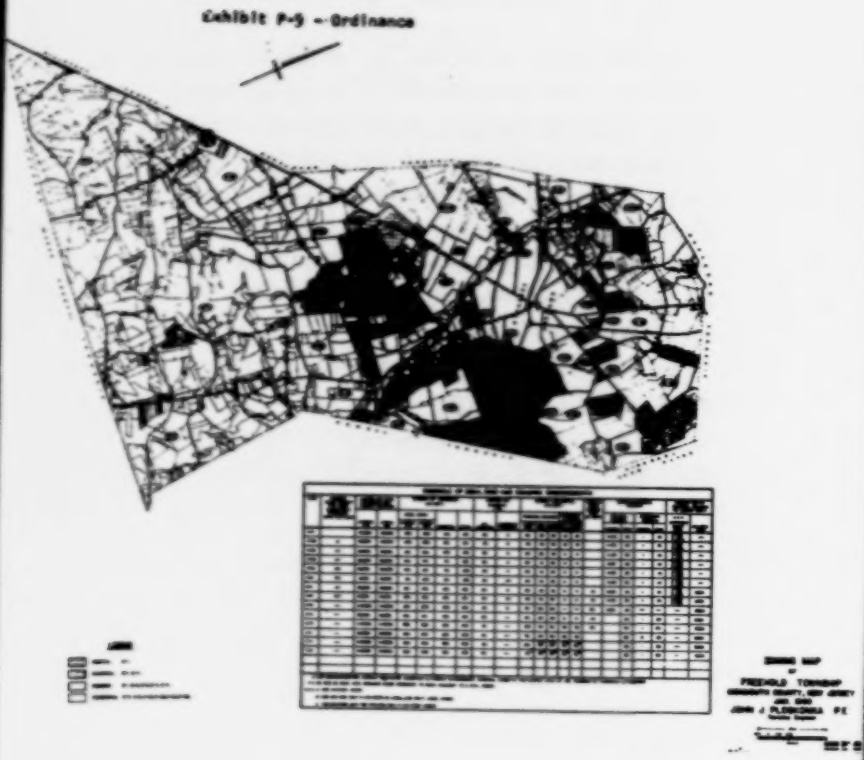
ancillary municipal services (school, etc.). It is implicit in the record that the 40,000 square foot restrictions imposed for the R-40 zones were believed to be effective for that purpose as not industrially acceptable to prospective builders. This appraisal has been borne not by the fact that there has been little or no development of homes on 40,000 square-foot lots since that restriction was first adoptd by Freehold in 1965.

We do not here suggest that fiscal considerations may not properly be given some weight in zoning. But we do aver that such considerations will not justify imposing substantial functional non-utilization of a property owner's lands. To do so is both confiscatory and to zone without "due regard to the character of the district and its peculiar suitability for particular uses." Raskin v. Morristown, 21 N.J. 180, 198 (1956). We are constrained to the conclusion that this is what has occurred here, and we find no substantial credible evidence to support the trial judge's finding to the contrary. Such zoning treatment of privately held lands is invalid. Morris County Land, etc. v. Parsippany-Troy Hills Tp., 40 N.J. 539, 557 (1963); Gruber v. Mayor and Tp. Com. of Raritan Tp., 39 N.J. 1, 12 (1962). The presumption of validity of the questioned provision of the ordinance has been satisfactorily overcome.

It may also be observed that a deliberate governmental attempt to prevent by zoning the residential utilization of land, apt for the purpose, on behalf of the generality of the population in need thereof, in favor of reserving such land for future utilization by more affluent users, would seem to conflict with present-day judicial thought as to appropriate relationships between zoning policy and social housing needs. See Oakwood at Madison, Inc. v. Tp. of Madison, 117 N.J. Super. 11 (Law Div. 1971).

Defendant's argument that plaintiffs' rights to complain about the restriction are somehow depreciated because they purchased after the restriction was put into effect is without merit. See Wilson v. Mountainside, 42 N.J. 426, 452-3 (1964). Such a situation does not constitute a "self created" hardship about which a property owner ordinarily may not complain. Ibid. The zoning restrictions affecting residential development of plaintiffs' properties are herewith declared invalid and are set aside. The township is allowed 90 days from the filing of this opinion to adopt reasonable zoning restrictions affecting residential development of plaintiffs' lands. Upon the township's failure so to do plaintiffs may develop their properties without regard to the area restriction in question (and any others directly related thereto such as dimensions and yards) but subject to all other applicable provisions of the zoning and other pertinent regulations of the municipality. No cost.

Appendix C



ZONING ORDINANCE OF THE TOWNSHIP OF FREEHOLD

An ordinance to amend an ordinance entitled: an ordinance to limit and restrict to specified districts or zones, and to resulate therein, buildings and structures according to their construction and the nature and extent of their use, and the nature and extent of the use of the land in the Township of Freehold, in the County of Monmouth and providing for the administration and enforcement of the provisions herein contained and fixing penalties for the violations thereof.

BE IT ORDAINED by the Township Committee of the Township of Freehold in the County of Monmouth and State of New Jersey, pursuant to the authority conferred by N.J.S.A. 40:55-30 et seq. and other statutes of the State of New Jersey and the amendments thereof and supplements thereto, as follows:

ARTICLE 1

SHORT TITLE, SUBTITLES AND NOTATION

1.1 This Ordinance shall be known and may be cited as "The Zoning Ordinance of the Township of Freehold."

1.2 For ease of reference the notation system used in this Ordinance consists of two numbers of three numbers separated by periods or decimal points; the first number is the number of the Article; the second and third numbers are divisions and subdivisions respectively of the Article; the parts of the Ordinance identified by a two number of three-number combination are referred to as a Section.

1.3 The titles and subtitles of the various articles and sections are intended for convenience only and shall not

be construed to limit the application of such articles and sections, unless such intention is clearly evident.

ARTICLE 2

PURPOSE

2.1 For the purpose of encouraging the most appropriate use of the land throughout the Township and to conserve the value of property with reasonable consideration for the character of the zone and its peculiar suitability for particular uses; all in accordance with a comprehensive plan designed to: provide a well balanced and stable economic structure; control rate and direction of growth; lessen congestion in the streets; secure safety from fire, panic, and other dangers; promote health and general welfare; provide adequate light and air; prevent the overcrowding of land; avoid undue concentration of population; and to that end, to regulate the height, design, appearance, number of stories and size of buildings and other structures; the percentage of the area of the lot that may be occupied, the size of the yards, courts, and other open spaces; the density of population and the location and use of building structures and land for trade, industry, residence or other purposes; and the height, size and location of these uses with the limits of the Township, these regulations are hereby established and shall hereafter apply.

ARTICLE 3

DEFINITIONS

3.1 General Meaning of Words and Phrases

3.2-1 Words used in the present tense include the future tense.

3.1-2 Words used in the singular include the plural, and conversely words used in the plural include the singular.

3.1-3 The word "shall" is always mandatory .

3.1-4 The word "lot" includes the word "plot" or "premise".

3.1-5 The word "used" includes the words "intended to be used" "designed to be used" or "arranged to be used".

3.1-6 The word "occupied" includes the words "intended to be occupied" "designed to be occupied" or "arranged to be occupied".

3.1-7 The word "person" includes a corporation as well as an individual.

3.1-8 The word "demonstrate" means to provide such visual, written or oral information as will enable the designated reviewing agency or board to ascertain the scope and nature of a proposed use or operation, and to render an informed opinion or decision thereon.

3.2 Definitions

3.2-1 Accessory Building, Structure or Use:

A building, structure or use subordinate to and customarily incidential to the principal building, structure or use on the same lot. Where an accessory building is attached to the principal building by a wall or roof, such accessory building shall be considered part of the principal building for the purpose of determining the required yard dimensions.

3.2-2 Alterations, Structural:

Any change, relocation or rearrangement of any supporting members, exterior walls or roof of an existing building.

3.2-3 Basement:

A story partly underground, but having less than one-half (1/2) its height below the average level of the adjoining ground.

3.2-4 Boarding House:

Any dwelling in which more than three (3) persons either individually or as families are housed or lodged for hire with or without meals. A rooming house or a furnished room house or a lodging house shall be deemed a boarding house.

3.2-5 Buffer:

A landscaped area designed to act as a visual screen between a potentially unsightly or otherwise undesirable or incompatible use and adjacent properties.

3.2-6 Building:

A structure having a roof supported by columns, piers, or walls, including tents, lunch wagons, trailers, dining cars, camp cars or other structures on wheels or other supports and designed or used for shelter, housing enclosure or storage of persons, animals or chattel.

3.2-7 Building Area;

The total of areas taken on a horizontal plane at the main grade level of the principal building and all accessory buildings exclusive of uncovered porches, terraces and steps.

3.2-8 Building Height:

The vertical distance measured from the average elevation of the proposed finished grade at the front of the building to the highest point of the roof for flat roofs; and to the mean height between eaves and ridge for gable, hip and gambrel roofs.

3.2-9 Building Line:

A line formed by the intersection of a horizontal plane and a vertical plane that coincides with the most projected exterior surface of the building. All yard requirements are measured to the building line.

3.2-10 Building, Principal:

A building in which is conducted the main or principal use of the site on which it is situated.

3.2-11 Cellar:

A story partly underground and having more than one-half (1/2) its height below the average level of the adjoining ground.

3.2-12 Coverage:

The part of a lot covered by buildings

3.2-13 Dwelling, One Family:

A detached building designed for or occupied exclusively by one (1) family.

3.2-14 Dwelling, Two Family:

A building designed for or occupied exclusively by two (2) families living independently of each other.

3.2-15 Dwelling, Multiple Family:

A building designed for or occupied by three (3) or more families living independently of one another.

3.2-16 Dwelling Unit:

A building, or portion thereof, providing complete living facilities for one family.

3.2-17 Essential Services:

Facilities installed or maintained by a public utility or governmental agency, including gas, electric, phone, water,

sewerage and other similar services necessary to the general health, safety and welfare of the public.

3.2-18 Family:

Any number of individuals related by blood, marriage or adoption, and their domestic employees, living together as a single housekeeping unit and sharing rooms and other housekeeping facilities in common.

3.2-19 Fence:

A structure forming an enclosure of an open area and designed to prevent straying from within or intrusion from without said enclosure, or to provide a visual barrier for the purposes of assuring privacy.

3.2-20 Flood Plain:

The area of relatively flat land adjoining a water course and subject to flooding from an overflow of said water course, including lands mapped by the Soil Conservation Service on maps entitled: "Classes of Land According to Use Capability" filed in the Office of the Soil Conservation Service in Freehold, New Jersey, as any one or all of the following:

C231	C321	C240	C540	C75
AO	A1	AO	AO	AO

3.2-21 Floor Area; Gross Habitable:

The sum of the areas of the floor or floors of a building which are enclosed and suitable for human occupancy and having a clear ceiling height of at least seven (7) feet but including closet space and hallways but excluding cellars, attics, dead air space, open porches, breezeways, attached garages and all necessary buildings. Said areas shall be measured between the inside face of exterior walls or from the center line of walls separating two dwelling units.

3.2-22 Garage, Private:

An accessory building used for storage purposes only and having a capacity of not more than three (3) automobiles, or not more than one (1) automobile per family housed in the building to which such a garage is accessory, whichever is greater. Space between may be utilized for not more than one (1) commercial vehicle, and space may be rented for not more than (2) vehicles of other than occupants of the building to which such garage is accessory.

3.2-23 Garage, Public:

Any building other than a private garage, available to the public operated for gain and which is used for storage, repair, rental, lubrication, washing, servicing, adjusting or equipping of automobiles or other motor vehicles.

3.2-24 Garden Apartment:

A multiple family dwelling or dwellings designed and constructed as a functional unit, not exceeding two stories in height, providing a resident superintendent, and featuring the extensive use of lawn areas and landscaping.

3.2-25 Grade, Finished:

The elevation of the completed surface of lawns, walks and roads brought to grades as shown on official plans or designs relating thereto, or already in existence.

3.2-26 Farm:

A parcel of land containing at least ten (10) acres which is used for gain in the raising of agricultural products, live stock, poultry and dairy products, but excluding the raising of furbearing animals, riding academies, livery or boarding stables or dog kennels.

3.2-27 Home Occupation:

Any occupation conducted on a residential property as an incidental and subordinate use by a member of the family residing on the premises.

3.2-28 Home Professional Occupation:

A home occupation conducted by a member of a recognized profession and limited to the following occupations: Doctors, lawyers, architects, engineers, artists, ministers, real estate brokers, insurance brokers, music teachers and other recognized professional practices, similar in character to the above, and requiring comparable levels of education and training.

3.2-29 Hotel:

A building containing twelve (12) or more rooms used, rented out or hired out for sleeping purposes by guests and where only a general kitchen and dining room are provided within the building.

3.2-30 Junk Yard:

The use of more than two hundred (200) square feet of any lot for the storage, keeping or abandonment of automobiles or boats not in operating condition or other vehicles or machinery or parts thereof.

3.2-31 Lots:

A piece, portion or parcel of land considered as a unit, devoted to a common use or occupied by, a building or group of buildings that are united by a common interest or use, and the area and extent of which are determined by the latest official records or by the latest approved map of a subdivision of which the parcel of land is a part.

3.2-32 Lot Area:

The size of a lot measured between the lot lines and expressed in terms of acres or square feet, but excluding that part of a lot included in a street right-of-way.

3.2-33 Lot, Corner:

A parcel of land at the intersection of and fronting on two or more streets.

3.2-34 Lot Coverage:

The percentage of a lot occupied by buildings.

3.2-35 Lot Depth:

A mean horizontal distance between the front and rear lot lines, measured in the general direction of its side lot lines.

3.2-36 Lot Line:

Any line dividing one lot from another lot or from a public thoroughfare.

3.2-37 Lot Frontage:

That portion of a lot extending along a street line. In the case of a corner lot, the lot line having the longest distance along the street shall be considered the front lot line.

3.2-38 Lot Width:

The mean horizontal distance between the side lot lines measured at right angles to its depth.

3.2-39 Motel:

A Hotel providing individual entrances from the exterior of the building to each unit and providing parking spaces convenient to each individual entrance.

3.2-40 Non-Conforming Buildings:

A building which in its design or location upon a lot does not conform to the regulations of this Ordinance for the zone in which it is located.

3.2-41 Non-Conforming Lot:

A lot of record existing at the date of the passage of the Ordinance, which does not meet the minimum area or dimension requirements for the zone in which it is located.

3.2-42 Non-Conforming Use:

A use of a building or lot that does not conform to the regulation of the zone in which it is located.

3.2-43 Open Space:

An unoccupied space open to the sky and on the same lot with the principal building.

3.2-44 Parking Space:

The area required for the parking of one (1) automobile which for the purposes of this Ordinance is held to be an area ten (10) feet wide and twenty (20) feet long exclusive of passageways and driveways appurtenant thereto and giving access thereto.

3.2-45 Patio:

A level paved surface normally or customarily used as an exterior sitting area and having no integral structural connection to any building.

3.2-46 Planning Board:

The Planning Board of the Township of Freehold.

3.2-47 Plat:

A map, plan or layout of a city, town, section, subdivision or property indicating the location and boundaries of individual properties or lots.

3.2-48 Principal Use:

The primary or main purpose for which a lot or building is being utilized.

3.2-49 Professional Office:

The office of a member of a recognized profession maintained for the conduct of his profession. Professions shall be deemed to include only those of medicine, law, architecture, engineering, art, music, religion and similar occupations which require a comparable degree of training, education and experience.

3.2-50 Residential Density, Gross:

The total number of dwelling units which may be developed on an area of land, before requirements for public access and open space are provided.

3.2-51 Restaurant:

An establishment at which food is sold for consumption on the premises to patrons seated within an enclosed building.

3.2-52 Restaurant, Drive-In:

Shall be an eating establishment at which provision is made for eating food commodities and non-alcoholic beverages for consumption in motor vehicles parked at the premises or by pedestrian patrons and by take away by pedestrians of vehicular traffic.

Wherever such facilities have heretofore been classified as a permitted use, such use shall remain a permitted use provided, however, that no such use shall be permitted in any zone classification within two thousand (2,000) feet of each other. Said distance shall be measured between property requirements of the respective sites, with the exception of such type facility constructed and erected incidental to a shopping center containing twenty thousand (20,000) square feet."

3.2-53 Site Plan:

A map or plan of a lot upon which is shown topography, all essential dimensions and bearings, the size and location of structures, roadways, parking areas and similar information necessary to show the proposed layout of a property and its relationship to the surrounding area.

3.2-54 Special Exception Use:

A use which by virtue of its own peculiar characteristics may be permitted in specified areas only upon issuance of a Special Use Permit granted by the Board of Adjustment following review and recommendation by the Planning Board and a public hearing.

3.2-55 Story:

That portion of a building included between the surface of any floor and the surface of the floor next above it, or if there be no floor above it, then the space between any floor and the ceiling next above it; except that a cellar shall not be considered as a story.

3.2-56 Story, Half:

A story under a gable, hip or gambrel roof, the wall plates of which on at least two (2) opposite exterior walls are no more than two (2) feet above the floor surface of such story.

3.2-57 Stream:

Any natural course of running water whether improved, unimproved, enclosed or realigned which presently or prior to any improvement, enclosure or realignment, had cut by the erosion of running water, a channel with well defined banks and a bottom and through which water flows ordinarily and frequently but not necessarily continuously.

3.2-58 Street:

Any street, avenue, boulevard, road, lane, parkway, alley or other way which is an existing state, county or municipal roadway or a street or way shown upon a plat heretofore approved pursuant to law or approved by official action, or a street or way on a plat duly filed and recorded in the office of the County Recording Officer prior to the appointment of a Planning Board and the grant to such Board of the power to review plats, and include the lands between the street lines whether improved or unimproved, and may comprise pavement, shoulders, gutters, sidewalks parking areas and other areas within the street line.

3.2-59 Street Line:

The line determining the limit between the highway rights of the public and adjoining private property.

3.2-60 Structure:

Any combination of materials forming a construction, assembly or erection, the use of which requires location upon the ground or attachment to something having a location upon the ground, including amongst other things, buildings, fences, walls, signs, radio towers, swimming pools, light stanchions and platforms.

3.2-61 Swimmnig Pool, Private:

A structure erected upon a property or an accessory to a residential building on the same lot therewith, and providing recreational facilities for swimming or wading for the use of the persons residing on the premises and their non-paying guests.

3.2-62 Swimming Pool, Public (Swim Club):

A public or privately owned structure providing recreational facilities for swimming or wading for the use of the membership of any private or quasi-public group, club or organization.

3.2-63 Yard, Front:

An open unoccupied space on the same lot with a principal building, extending the full width of the lot and situated between the street line and the front building line. The depth of the front yard shall be measured at right angles to the street line.

3.2-64 Yard, Rear:

An open unoccupied space on the same lot with a principal building, extending the full width of the lot and situated between the rear lot line and the rear building line. The depth of the rear yard shall be measured at right angles to the rear lot line.

3.2-65 Yard, Side:

An open unoccupied space on the same lot with a principal building extending from the front yard to the rear yard and situated between the side lot lines and the side building line. The side yard shall be measured at right angles to the side lot line.

3.2-66 Dormitory; As Applicable to Hospital Zone:

A residence hall providing separate rooms or suites for individual nurses or individual interns, or for groups of two, three or four nurses or interns with common bathroom facilities. Separate facilities being provided for both sexes.

3.2-67 Zoning Board:

The Zoning Board of Adjustment of the Township of Freehold.

3.2-68 Open Green Area:

An open space unoccupied by buildings or streets in which improvements are limited to walkways, paths, trees and other landscaping materials, groundcover and grass.

3.2-69 Planned Adult Community

One or more contiguous parcels of land having a total land area of 75 acres or more acres under common ownership or control which is planned for development with residential dwelling units and other structures and facilities designed to be occupied and used by and for single individuals 52 years of age or over; married couples at least one of whom is 52 years of age or over; two closely related persons, e.g. sisters, brothers, brother and sister, aunt and neice, parent and child, etc., when both persons are 52 years of age or older; one person over 19 years of age may reside in a dwelling unit with an elderly person or persons as permitted above, if the presence of such person is essential for the physical care or economic support of the elderly person or persons; children 19 years of age or older may reside with a parent or parents. Ownership of the residential units and an area comprising the P.A.C. shall be in accordance with the provisions of N.J.S.A. 46:8B-1, et seq., or in fee simple in conjuction with a homeowner's association; and all sale, resale, rental, leasing or occupancy of the units or any of the structures comprising the P.A.C. shall be subject to and must comply with the terms and conditions of this Ordinance.

ARTICLE 4
ESTABLISHMENT OF ZONES

4.1 Zones

RR	Rural Residential Zone	R-25	Residential Zone
R-9	Residential Zone	R-40	Residential Zone
R-15	Residential Zone	B-1	Office & Personal Service
R-20	Residential Zone		

Zone-1

B-2	Office & Personal Service

Zone-2

B-3	Neighborhood Business Zone	M-1	Industrial Zone
B-4	Service & Supply Zone	M-2	Industrial Zone
B-5	Highway Development Zone	H-1	Hospital Zone and services necessary and incidental thereto

4.2 Zoning Map:

The boundaries of all zones are shown on a map entitled "Zoning Map of the Township of Freehold," dated January, 1969 and as amended March 1970. Said map, together with all explanatory matter thereon, is hereby made a part of this Ordinance as if set forth at length therein.

4.3 Interpretation of Zone Boundaries:

Where uncertainty exists with respect to the boundaries of any zone as shown on the Zoning Map, the following definition shall govern:

4.3-1 Zone boundary lines are intended to follow the center lines of streets, streams, railroad rights-of-way and lot or property lines, unless said boundary lines are fixed by, dimensions shown on the Zoning Map or as hereinafter set forth.

4.3-2 Where zone boundary lines, not fixed by dimensions and are so indicated that they appear to be within ten (10) feet of a lot line as determined by scale from the zoning map, such lot line shall be construed to be said boundary line.

4.3-3 In those instances where zone boundary lines appear as extensions of property lines, and in other instances where the zone boundary line divides a lot, and where said boundary line appears to be more than ten (10) feet distant from a property line the location of said boundary line shall be determined by the use of the scale shown on the Zoning Map.

4.4 Schedule of Area, Yard and Buld Requirements:

The attached schedule of area, yard and bulk requirements is hereby made a part of the Ordinance as though set forth at length with the same force and effect.

ARTICLE 5

GENERAL PROVISIONS

5.1 Applicability of Regulations Except as hereinafter Provided:

No structure shall hereafter be erected, structurally altered or moved nor shall any lands or the buildings thereon be used for any purpose except in conformity with all regulations hereinafter established for the zone in which said land or structure is located. Nor shall any open space or yard area established for the purpose of complying

with the regulations of this Ordinance be reduced or encroached upon in any manner except as shall be specifically permitted in this Ordinance.

5.2 Permitted Yard Encroachments:

No building or part thereof shall be erected within or project into any required yard area except in accordance with the following provisions:

5.2-1 An open entrance porch not more than ten (10) feet in width shall not project more than eight (8) feet into a required front yard area.

5.2-2 An open and unroofed patio not more than three (3) feet above ground level may extend into a required side or rear yard to within ten (10) feet of a side or rear property line. Such patios, if at ground level, may extend to within five (5) feet of a side or rear property line.

5.3 Permitted Height Exceptions:

5.3-1 Appurtenances Attached to Principal Structures:

The height limitations of this Ordinance shall not apply to church spires, belfried, domes, antennas attached to buildings, silos, or penthouses, none of which are to be used for human occupancy; nor to chimneys, ventilators, skylights, water tanks, bulkheads and the necessary mechanical appurtenances usually carried above the roof level.

Such features, however, shall not exceed in coverage twenty (20) per cent of the total roof area and shall not exceed a height such as is necessary to accomplish the purpose which they are intended to serve.

In single family residential zones and on properties adjacent to single family residential zones any such appurtenances which exceed the height limit by more than five

(5) feet shall not be located nearer to any property line than a distance equal to its height above ground.

5.3-2 Free Standing Accessories:

Water towers, radio and television antennas and flag poles which are erected as free standing accessories and which might normally exceed the height limitations established by this Ordinance may be erected to a height which can be demonstrated to the satisfaction of the Freehold Township Planning Board as necessary to accomplish their intended function, except that in residential zones and on properties adjacent to residential zones, no such structure may be located near to any property line than a distance equal to its height above ground.

5.3-3 No sign nameplate, display or advertising device of any kind whatsoever shall be inscribed upon or attached to any chimney, tower, tank or any other structure which extends above the height limitations which are established in this Ordinance.

5.4 Except as might be hereinafter specifically provided, there shall not be more than one principal residential building erected on any lot.

5.5 No principal building shall be erected upon a lot which does not have frontage upon a public street improved to meet requirements of the Township or for which such improvements have been guaranteed in accordance with requirements established in the Land Subdivision Ordinance of the Township of Freehold.

5.6 Front Yards:

5.6-1 Any yard facing upon a public street shall be considered a front yard and shall conform to the minimum front yard requirements established for the zone in which said yard is located.

5.6-2 No necessary structures, with the exception of flag poles, and sign posts shall be erected within any front yard.

5.6-3 No front yard shall be used for the storage of boats, trailers, equipments, or vehicles other than automobiles which are in operating condition and which are parked on an improved driveway or parking area, except as might be specifically permitted elsewhere in this Ordinance.

5.7 On any corner lot, nothing shall be erected, placed, planted or allowed to grow in such a manner as to obstruct vision between a height of two and one-half (2-1/2) feet and ten (10) feet above the center line grades of the intersecting streets, within the triangular area formed by the two intersecting street lines bounding the lot and by a line connecting points on each street line located twenty-five (25) feet from the intersection of said street lines.

5.8 No accessory structure, excluding fences and temporary buildings necessary for construction purposes, is to be erected prior to the completion of the principal building. Such temporary construction buildings may be erected only after the issuance of a building permit for the principal building and shall be removed within thirty (30) days of the issuance of a certificate of occupancy, for the principal buildings; or in the case of a major subdivision, within thirty (30) days of the issuance of a certificate of occupancy for the final home in the subdivision.

5.9 No structure shall be erected within the boundary of any flood plain of within fifty (50) feet of the top of the bank of any stream, whichever distance represents the greatest setback from the stream.

5.10 Existing natural features such as streams, lakes, ponds, trees and the natural configuration of the ground

shall be retained wherever possible. If it can be demonstrated to the satisfaction of the Freehold Township Planning Board that such features will substantially interfere with any reasonable proposed use of a property such features may be altered only to the extent necessary to permit such use.

5.11 Appearance of Buildings:

No building or structure shall hereafter be erected, constructed, placed or enlarged in any Residence District which shall be like or substantially like any neighboring building, or structure, as hereinafter defined, then in exietence or for which a building permit has been issued, or which is included in the same building permit application, in more than three of the following six respects:

A. Height of the main roof ridge above the top of the plate (all flat roofs shall be deemed identical in this dimension);

B. Height of the main roof ridge, or in the case of a building structure with a flat roof, the highest point of the roof beams above the elevation on the first floor;

C. Length of the main roof ridge, or in the case of a building or structure with a flat roof, length of the main roof;

D. Width between outside walls at the ends of the building or structure measured under the main roof at right angles to the length thereof;

E. Relative location of windows in the front elevation or in each of both side elevations with respect to each other and with respect to any door, chimney, porch or attached garage in the same elevation;

F. In the front elevation, both (a) relative location with respect to each other of garage, if attached, porch, if any,

and the remainder of the building or structure, and (b) either (i) height of any portion of the building of structures located outside the limits of the main roof measured from the elevation of the first floor to the roof ridge, or in the case of a flat roof, the highest point of the roof beams, or (ii) width of said portion of the building or structure if it has a gable in the front elevation otherwise length of said roof ridge or said flat roof in the front elevation. Buildings or structures whall be deemed to be like each other in any dimension with respect to which the difference between them is not more than two feet. Buildings or structures between which the only difference in relative location of elements is end to end or side to side reversal of elements shall be deemed to be like each other in relative location of such elements.

In relation to the premises with respect to which a building or structure is sought to be erected, constructed, placed, altered or enlarged, a building or structure shall be deemed to be a neighboring building or structure if the lot upon which it may or any part of it has been or will be located is any one of the following lots:

A. Any lot on the street upon which the building or structure to be located on said premises would front which is the first building or structure on either side of said building or structure on the same side of the street without regard to intervening street lines.

B. Any building or structure to be erected on any lot, any part of a street line frontage of which is across said street from said premises.

C. Any lot any part of the street line frontage of which faces the end of, and is within the width of, said street, if there are less than two lots between said premises and the end of said street;

D. Any lot any part of the street line frontage of which is across such other street from said premises or from a lot referred to in paragraph D of this section.

ARTICLE 6

ZONE REGULATIONS

6.1 Rural Residential Zone:

6.1-1 Permitted Uses:

A. Farms

B. Single Family Dwellings

C. Public Parks and Playgrounds

D. Municipal Buildings essential to the operation of the Township, subject to general review and recommendation by the Planning Board.

6.1-2 Permitted Accessory Uses:

A. Private Garage with a capacity for garaging not more than three (3) automobiles.

B. Tool shed or similar storage building not exceeding one hundred twenty (120) square feet in building area.

C. Private swimming pools

D. Fences

E. Signs

F. Outdoor barbecue structures

G. Shelters for domestic pets, rpovided that the building area does not exceed thirty (30) square feet.

H. Essential utilities

I. Farm storage sheds and barns

6.1-3 Uses Permitted Subject to Issuance of a Special Use Permit:

A. Home Professional Offices

B. Home Occupations

C. Swim-Clubs

D. Churches and Places of Worship

E. Public, Private or Parochial Schools

6.1-4 Area, Yard and Building Requirements:

As specified in the Schedule.

6.1-5 Permitted Modifications:

None

6.2 R-40 Residential Zone:

6.2-1 Permitted Uses:

A. Same as for Rural Residential Zone

B. Planned Adult Communities as defined by this ordinance.

6.2-2 Permitted Accessory Buildings

A. Same as for Rural Residential Zone

B. The following but only as accessory uses to a Planned Adult Community.

(1) Normal and necessary accessory buildings and facilities, including but not limited to gate houses, garages, guard houses, storage facilities for maintenance equipment and administrative, social, cultural and recreational facilities and structures.

(2) Commercial activities for the convenience of the residents of the project and their guests are permitted,

but must be confined within doors and without any advertising or other display on the outside of any building. Such facilities should be located out of the public view and subordinate to the residential character of the project.

(3) Small infirmaries, medical and first aid rooms to provide observation, minor treatment and short term nursing care of project residents and their guests may be permitted if such facilities are not readily and conveniently available.

6.2-3 Uses Permitted Subject to Issuance of a Special Use Permit:

A. Same as for Rural Residential Zone

B. Garden type, Multi Family apartments, subject to the provisions of Article 10.26-9.

6.2-4 Area, Yard and Building Requirements:

A. As specified in the Schedule.

B. For Planned Adult Communities subject to Article 11.

6.2-5 Permitted Modifications:

None.

6.3 Residential Zone R-25:

6.3-1 Permitted Uses:

Same as for Rural Residential Zone

6.3-2 Permitted Accessory Uses:

Same as for Rural Residential Zone

6.3-3 Uses Permitted Subject to Issuance of a Special Use Permit:

A. Same as for Rural Residential Zone.

B. Garden-type multi-family apartments, subject to the provisions of Article 10.26-9.

6.3-4 Area, Yard and Building Requirements:

As specified in the Schedule

6.3-5 Permitted Modifications:

None.

6.4 R-20 Residential Zone:

6.4-1 Permitted Uses:

Same as for Rural Residential Zone

6.4-2 Permitted Accessory Uses:

Same as for Rural Residential Zone

6.4-3 Uses Permitted Subject to Issuance of a Special Use Permit:

A. Same as for Rural Residential Zone.

B. Garden-type, multi-family apartments, subject to the provisions of ARticle 10.26-9.

6.4-4 Area, Yard and Building Requirements:

As specified in the Schedule.

6.4-5 Permitted Modifications

6.5 R-15 Residential Zone:

6.5-1 Permitted Uses:

Same as for Rural Residential Zone

6.5-2 Permitted Accessory Uses:

Same as for Rural Residential Zone

6.5-3 Uses permitted Subject to Issuance of a Special Use Permit:

Same as for Rural Residential Zone

6.5-4 Area, Yard and Building Requirements:

As specified in the Schedule

6.5-5 Permitted Modifications:

None

6.6 R-9 Residential Zone

6.6-1 Permitted Uses:

Same as for Rural Residential Zone, except that Farms are not permitted.

6.6-2 Permitted Accessory Uses:

Same as for Rural Residential Zone, except that Farm Storage Sheds and Barns are not permitted.

6.6-3 Uses Permitted Subject to Issuance of a Special Use Permit:

A. Home Professional Offices

B. Home Occupations

6.6-4 Area, Yard and Building Requirements:

As specified in the Schedule

6.6-5 Permitted Modifications:

None

6.7 Highway Development Zone (B-5):

6.7-1 Permitted Uses:

A. Office buildings for professional executive engineering and/or administrative purposes, including accounting, purchasing and sales functions.

B. Retail stores and shops

C. Personal Service establishments

D. Theatres (indoor), assembly halls, bowling alleys and similar public recreational activities.

E. Restaurants, cafes and tea rooms.

F. Hotels and motels

G. Motor Vehicle Salesrooms

H. Wholesale business and distributors

I. Passenger Bus Stations

J. Research Laboratories and light industries for the manufacture of products which may be produced without the creation of objectionable or detrimental effects on any other properties, subject to the performance requirement and specifications as hereinafter set forth in this Ordinance.

K. Horse Race Tracks, horse race courses and premises used for horse racing purposes of any nature whatsoever, shall be subject to the following provisions:

a. No building and no horse race track, race course or other construction for use for racing purposes of any nature shall be erected or permitted nearer than two hundred (200) feet from any road, excepting and providing, however, that one-story utility buildings used for storage and parking area purposes and ticket booths may be erected and permitted not less than one hundred (100) feet from said road.

b. No grandstands, stadia, or structures for the seating and accommodation of spectators, shall be erected or permitted nearer than two hundred (200) feet from any adjoining property line.

L. Public Utility Installations

6.7-2 Permitted Accessory Uses:

A. Storage buildings and Garages provided that it can be demonstrated to the satisfaction of the Freehold Township Planning Board that such accessory buildings are necessary to the successful operation of the principal use on the premises, and that a definite economic hardship, or a health or safety hazard would be created if such accessory building were not permitted; and further provided that no accessory building be used for sale purposes of any nature.

B. Signs

C. Fences

6.7-3 Uses Permitted Subject to Issuance of a Special Use Permit:

A. Gasoline Filling Stations

6.7-4 Area, Yard, and Building Requirements:

As specified in the Schedule

6.7-5 Supplementary Regulations:

A. Nothing shall be stored out-or-doors for any purpose except in compliance with the following provisions:

1. New or used automobiles on display for sale or awaiting delivery may be stored out-of-doors as a permitted accessory use to a new car dealership for an indefinite period of time, provided that said automobiles are in operating condition and further provided that they shall be stored on a paved area constructed to the standards established in accordance with Land Subdivision Ordinance of the Township of Freehold.

2. All garbage or trash or any other refuse awaiting disposal shall be stored in a completely enclosed container.

3. Products and materials necessary to and supplementary to a permitted principal use and which are customarily stored out-of-doors, may be stored out-of-doors provided that:

a. The area used for such outdoor storage shall be paved in accordance with requirements of Article 7, 7.1-6.

b. Said storage shall be permitted only in a rear yard area.

c. Said storage shall be screened from view from any public right-of-way.

d. All materials stored out-of-doors shall be arranged and maintained in a safe, orderly and neat manner.

B. Whereas the basic intended uses for this zone are not compatible with residential uses and whereas the intermingling of these uses with residential uses might prove inimical to the health, safety and welfare of persons residing within the confines of this zone, all residential uses are hereby excluded from this zone.

6.8 Service and Supply Zone (B-4):

6.8-1 Permitted Uses:

A. General business activities including such activities as Retail Sales, offices, and Banks, eating and drinking establishments and personal services.

B. Building material storage, supply and sales including such activities as lumber yards, mason materials, storage and sales, plumbing and electrical service and sales and similar storage and wholesale and retail sales designed to supply and service construction and building activities.

C. Contractors shops, yards and offices.

D. Small repair and machine shops generally employing fewer than ten (10) persons; and custom shops primarily engaged in the production of articles or products to be sold at retail on the premises.

E. Commercial laundries and dry cleaners provided that any commercial laundry shall be connected with a public sewage disposal system.

F. Public garages and gasoline filling stations.

G. Animal hospital and shelters

H. Public utility garages and storage facilities

I. Printing Shops

J. Public Utility Installations

6.8-2 Permitted Accessory Uses:

A. Storage sheds, except that lumber storage sheds shall be considered as a principal use.

B. Garage facilities

C. Signs

D. Fences

6.8-3 Area, Yard and Building Requirements:

As specified in the Schedule

6.8-4 Supplementary Regulations:

A. Outdoor storage is permited in any yard subject to the following restrictions:

1. No outdoor storage shall be permitted within ten (10) feet of any street line or within five (5) feet of any side or rear lot line.

2. Outdoor storage shall be limited to equipment, merchandise or material necessary to the operation of the principal use on the premises, not normally or economically stored indoors. No junk cars, wrecked cars or cars damaged by accident or damaged in any other manner; or which are in such condition that they cannot operate under their own power; used auto parts or appliances;

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used auto or truck tires; damaged or discarded machinery, equipment or parts thereof, used or damaged refrigerators, household or electrical appliances or other damaged or disabled merchandise; or junk shall be stored, maintained, or permitted to remain situated in the open on any premise for more than fifteen (15) days from the time first placed on said premises, and said items must thereafter be permanently removed from the premises or permanently removed from the open and stored with a completely enclosed building.

Specifically excluded from this time requirement are disabled or damaged motor vehicles awaiting repair at an automotive repair shop. For these purposes the above fifteen (15) day requirement shall be extended to sixty (60) days in order to permit a reasonable time for insurance adjustment and parts ordering purposes.

3. All garbage, trash or any other refuse awaiting disposal shall be stored in a completely enclosed container.

4. Anything being stored out doors shall be placed and maintained in an orderly, safe manner.

5. Front yard storage shall be restricted to items being displayed for sale or rental purposes.

B. (Same as Section 6.7-5. B)

6.9 Neighborhood Business Zone (B-3):

6.901 Permitted uses shall be among those specified herein, but shall also further be limited to those uses which are clearly of a nature designed to primarily serve adjacent residential areas within a two to three mile radius and which only incidentally serve other areas.

A. Retail stores and shops such as Grocery Stores, drug stores, hardware stores, dry good stores, baked goods stores, meat and poultry stores, flower shops, haberdashery and apparel shops, shoe stores.

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B. Personal services establishments such as barber shops, beauty parlors, shoe repair shops, dry cleaning shops, tailor shops, self service laundries.

C. Business and professional offices, banks, post offices and municipal offices.

6.9-2 Permitted Accessory Uses:

A. Signs

B. Fences

6.9-3 Uses Permitted Subject to Issuance of a Special Use Permit:

A. Gasoline Filling Stations

6.9-4 Area, Yard and Building Requirements:

As specified in the Schedule

6.9-5 Supplementary Regulations:

A. Nothing shall be stored out of doors for any purpose except that garbage and trash or any other refuse awaiting disposal may be stored in a rear yard in a completely enclosed container.

B. Persons establishing uses in this zone are encouraged to give particular attention to aesthetic considerations especially in connection with structural design and the use of landscaping to soften building lines and provide visual breaks in parking lot areas.

6.10 Office and Personal Service Zone—1 (B-2):

This zone is intended to be utilized as a buffer zone between residential zones and more intensive zones, and as such, each use within this zone shall be designed, constructed and operated in such a manner as to create the least possible disruption to adjacent residential properties.

TABLE OF CONTENTS

	Page
Opinions Below	1
Counter-Statement of Facts	2
ARGUMENT:	
POINT I: The constitutional question here involved does not warrant consideration by the Supreme Court of the United States	8
POINT II: The subject zoning ordinance, insofar as it pertains to respondents' tracts of land, is confiscatory and, therefore, invalid	10
Conclusion	14
Addendum "A" Order Denying Petition for Certification	A1
Addendum "B" Order Denying Appeal	A2
CASES CITED:	
Arverne Bay Construction Co. v. Thatcher, 278 N.Y. 222, 15 N.E. 2d 587, 117 A.L.R. 1110 (Ct. App. 1938)	12, 13
Brandon v. Montclair, 124 N.J.L. 135, 11 A.2d 304 (Sup. Ct. 1940) aff'd. 125 N.J.L. 367, 15 A.2d 598 (E. & A. 1940)	11
Euclid v. Ambler Realty Co., 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114, 54 A.L.R. 1016 (1926)	8, 10
Gruber v. Mayor and Tp. Com. of Raritan Tp., 39 N.J. 1, 186 A.2d 489 (1962)	12

TABLE OF CONTENTS

CASES CITED: Page

Katobimar Realty Co. v. Webster,
20 N.J. 114, 118 A.2d 824 (1955) 12

Kozesnick v. Montgomery Twp.,
24 N.J. 154, 131 A.2d 1 (1957) 12

Morris County Land, etc. v. Parsippany-Troy Hills, Tp.,
40 N.J. 539, 193 A.2d 232 (1963) 12

Nectow v. Cambridge,
277 U.S. 183, 72 L. Ed. 842, 48 S. Ct. 447 (1928) 8, 11

Raskin v. Morristown,
21 N.J. 180, 121 A.2d 378 (1956) 12

Tidewater Oil Co. v. Mayor and Council of Carteret,
44 N.J. 338, 209 A.2d 105 (1965) 8

United Advertising Corp. v. Maplewood,
136 N.J.L. 336, 56 A.2d 407 (Sup. Ct. 1947) 12

STATUTE CITED:

N.J.S.A. 40:55-32 6

AUTHORITIES CITED:

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TABLE OF CONTENTS

Page

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. _____

FRANK SCHERE; JACOB BLACK; ANNA BLACK; DAVID ROBINSON; LILLIAN ROBINSON; LAWRENCE COHEN; BARBARA COHEN; and SALLY TANNENBAUM,

Respondents,

vs.

TOWNSHIP OF FREEHOLD,

Petitioner.

OPINIONS BELOW

The opinion of the Superior Court of New Jersey, Law Division, is unreported and appears as Appendix A of the Petition for Writ of Certiorari, pages 1a through 20a.

The opinion of the Superior Court of New Jersey, Appellate Division, is reported in 119 N.J. Super. 433, 292 A.2d 35 (App. Div. 1972).

Petitioner's Petition for Certification to the Supreme Court of New Jersey was denied and Petitioner's appeal to the Supreme Court of New Jersey was dismissed September 21, 1972. Copies of the Orders of denial and dismissal appear, respectively, as Addendum "A" and Addendum "B", printed *infra* at pages A1 and A2.

COUNTER-STATEMENT OF FACTS

Respondent Schere is the owner of a tract of land in Freehold Township, Monmouth County, New Jersey, known as the Buck Farm and approximately 108 acres in area. Respondents Cohen and Tannenbaum are the owners of a tract of land in said Township known as the Wardell Farm and approximately 215 acres in area.

The locations of the Buck Farm and Wardell Farm and uses and zones surrounding the same are as shown upon Exhibit P-23 prepared by respondents' expert witness, James P. Kovacs, a professional engineer (T92-10) and upon Exhibits P-25 (T120-9) and P-26 (T127-14) prepared by respondents' expert witness, John D. Lazurus, a real estate broker, consultant and appraiser. The Buck and Wardell Farms and areas surrounding the same are more fully and completely described in the testimony of the aforesaid two expert witnesses. The Buck Farm and uses and areas surrounding the same are shown in the series of photographs, Exhibit P-31 in evidence. The present zoning of the entire township is shown upon the large exhibit, Exhibit J-1, and upon the map which appears as a part of Exhibit P-9 (T56-17).

The history of zoning in the Township of Freehold is briefly as follows:

The first zoning ordinance of Freehold Township, was adopted October 2, 1953. By this ordinance, six zones were established, as shown upon the "Zoning Map of Freehold Township, Monmouth County, New Jersey, 1953" (Exh. P-1). Except for strip zoning along State Highway Route 9 and some areas principally abutting and lying to the southwest and east of the Borough of Freehold, the entire township was placed in the Residention A Zone wherein the minimum lot area was 20,000

square feet and minimum lot width was 100 feet. The premises of respondents in both of these actions were placed in said Residential A Zone.

The first amendment of said original ordinance was adopted February 25, 1965 (Exh. P-2), and merely added to the uses prohibited in the Industrial E Zone.

A further amendment adopted May 24, 1965 (Exh. P-2), was a so-called interim ordinance which purported to amend the original ordinance "pending the completion of the necessary studies and the adoption of appropriate standards" to be included in a proposed new comprehensive zoning ordinance for the township. This interim ordinance purported to impose upon all residential zones other than an existing B-1 Residential Zone certain specified restrictions, including a requirement that no lot area therein should be less than 40,000 square feet and no lot width or lot depth less than 200 feet.

A further amendment also adopted May 24, 1965 (Exh. P-2), prohibited future construction of dwellings in any industrial or commercial zone.

A further amendment known as "The Township of Freehold Zoning Ordinance, 1965, Revision 2" was adopted June 14, 1965 (Exh. P-2). This established certain restrictions on the location of "filling stations."

A further amendment was adopted on December 27, 1965 (Exh. P-2). This amendment placed certain specified areas formerly situate in the Residential A Zone in the Industrial E Zone. This ordinance also, in Section 3 thereof, amended the original zoning ordinance and zoning map incorporated therein to reflect the aforesaid change in zoning.

A further amendment was adopted February 28, 1966 (Exh. P-2). This rezoned certain premises described therein from the Commercial D Zone to the Residential A Zone.

A further amendment was adopted April 25, 1966 (Exh. P-2). This prescribed certain restrictions and standards for the Commercial D or Highway Development Zone.

A further amendment was adopted May 23, 1966 (Exh. P-2). This prescribed and amended restrictions and standards for the Commercial D or Highway Development Zone.

A further amendment was adopted August 22, 1966 (Exh. P-2). This purported to amend and supplement the original ordinance so as to require a minimum lot width of 200 feet and a minimum lot depth of 160 feet in the Residential A Zone.

A further amendment was adopted September 22, 1966 (Exh. P-2). This amended and supplemented the provisions respecting the Industrial E Zone.

A further amendment was adopted October 10, 1966 (Exh. P-2). This defined the terms "Home Occupation" and "Home Professional Occupations" and provided for such uses by way of special use permits in residential zones.

A further amendment was adopted April 22, 1968 (Exh. P-2). This ordinance removed a large area adjacent to the Buck Farm on the south from the Residential A Zone and placed it in the Industrial E Zone.

On January 13, 1969, there was introduced and passed on first reading what purported to be a comprehensive revision of the original zoning ordinance as theretofore amended and supplemented (Exh. P-3, Map).

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This ordinance, never finally adopted (T3-19), would have continued the Buck Farm in the R-40 Zone where it had been placed by the interim ordinance adopted May 24, 1969. This ordinance would have placed the Wardell Farm partly in the R-40 Zone, in which the entire Wardell Farm had been placed by said interim ordinance, and partly in the R-25 Zone. This ordinance, as introduced, gave rise to a great deal of opposition and controversy (T49-17, T55-20). Petitions for changes were submitted by various groups of citizens to the Township Committee. A "Blue Ribbon" study committee of "residents in Freehold Township and business people" was appointed by the Mayor (T50-9) to "go out and meet as a body, talk to the people in the different areas, get a look at the township, and then come back with their recommendations on the zoning ordinance. . . ." On March 10, 1969, while the ordinance introduced January 13, 1969, was still pending, a lengthy amendment (Exh. 4A, B Map) (by which, among other things, the entire Wardell Farm was continued in the R-40 Zone) thereto was introduced and passed its first reading. Both said ordinance and said amendment were brought up for public hearing and further consideration on May 26, 1969. The amendment was actually voted upon and passed by the affirmative vote of three members of the five-member Township Committee (T307-1) with two members abstaining (T307-4). For some reason, no vote was taken upon the basic ordinance introduced January 13, 1969, with the result that neither the ordinance nor the amendment ever became effective. After this fatal defect in adoption had been brought to the attention of the Court upon the date originally scheduled for trial, the matters were adjourned to permit correction thereof.

On March 8, 1971, there was introduced and on April 12, 1971, adopted a zoning ordinance (T56-6 through 23)

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(Exh. P-9) which, except for the incorporation of two amendments one dealing with garden apartments and one dealing with planned adult communities, was identical with that introduced January 13, 1969, as that ordinance was intended to be amended by the amendment introduced March 10, 1969 (T237-6). It was stipulated and understood by the Court and all parties at the trial that, insofar as the ordinance of April 12, 1971, pertained to the premises of the respondents there was no change and that it was, in effect, the same ordinance as the ordinance and amendment thereto purportedly adopted May 26, 1969, and referred to in the pleadings, that it was attacked upon the same grounds and that additional pleadings would be unnecessary (T4-18).

Like the ordinance introduced January 13, 1969, that adopted April 12, 1971, recited in Article 2 among the purposes for which said ordinances were to be adopted not only those permissible purposes and essential considerations for zoning prescribed by *N.J.S.A.* 40:55-32 but also the following: ". . . provide a well balanced community and stable economic structure; control rate and direction of growth. . . ."

By the April 12, 1971 ordinance, both the Buck Farm and the Wardell Farm were continued in the R-40 Zone in which they and all other property theretofore situate in residential zones, other than the B-1 Residential Zone as it then existed, had been placed by the interim ordinance May 24, 1965. All other property placed by said interim ordinance in R-40 Zone, with the exception of those properties for which subdivision approval had been secured prior to the adoption of the interim ordinance, various small areas surrounded by or adjacent to the properties so subdivided and certain properties placed in commercial or industrial zones by amendments adopted

prior to May 26, 1969, were, by the April 12, 1971 ordinance, placed in either the R-40 Residential Zone or the RR Residential Zone (Exh. P-4A and B, Exh. J-1). The bulk and use requirements for the R-40 and RR Zones are identical except that, in the former, garden apartments are, to a limited extent, permitted by way of special exceptions and subject to the stringent provisions of Article 10:26-9 and planned adult communities are permitted subject to the stringent and procedurally cumbersome provisions of Article 11.

It was and is the position of the respondents:

1. That the April 12, 1971 ordinance, as applied to the premises of the respondents is illegal, discriminatory, confiscatory, unreasonable, arbitrary and violates the Constitutions of the State of New Jersey and of the United States; higher restrictions have been placed upon said premises although no changes have taken place to justify imposition thereof; said restrictions are not reasonably adapted to accomplish the purposes for which zoning is permissible; said restrictions are imposed without reasonable consideration being given to the prior existing character of the area, its suitability for particular purposes, the conservation of property value or the most appropriate use of land throughout the Township of Freehold.

2. That said ordinance did not represent final or comprehensive zoning but that, with respect to respondent's premises and all other lands continued and placed in the R-40 and RR Zones, it illegally continued in effect the interim zoning put into effect by the interim ordinance adopted May 24, 1965, far beyond a period reasonable for the duration of an interim ordinance.

ARGUMENT

POINT I

The constitutional question here involved does not warrant consideration by the Supreme Court of the United States.

Since deciding the two leading cases, *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114, 54 A.L.R. 1016 (1926) and *Nectow* v. *Cambridge*, 277 U.S. 183, 72 L. Ed. 842, 48 S. Ct. 447 (1928), the Supreme Court of the United States has heard comparatively few zoning cases. "The case-by-case examination of the effect of zoning regulations upon specific parcels of lands has gone forward in the state courts, following the pattern established in *Nectow* and *Euclid*." Anderson, *American Law of Zoning* (1968 Edition) Volume 1, § 2.11 at page 57.

The instant cases involve no new Constitutional principles and no novel application of well established Constitutional principles. Discussion of this aspect of the matter by the Supreme Court of New Jersey in *Tidewater Oil Co.* v. *Mayor and Council of Carteret*, 44 N.J. 338, 341, 209 A.2d 105, 107 (1965) is pertinent. At 44 N.J. 343, 209 A.2d 108, the Court said:

> "The plaintiffs' conclusional contention that the ordinance prohibition of the proposed use by Tidewater is unconstitutionally capricious and discriminatory is broadly cast in the familiar due process and equal protection concepts of the Fourteenth amendment. But the supporting argument boils down, as in most cases of this kind, to a claim that, in this particular factual setting, the ordinance treatment is unreasonable because not within the purposes and essential

considerations or the requirement of uniform regulations specified by the zoning enabling act as necessary to undergird valid local legislation. *N.J.S.A.* 40:55-31 and 32. While these statutory prerequisities have loose constitutional connotations, the fundamental question here resolves itself into a matter of application of statutory standards to a particular factual situation under long established principles. At this relatively advanced stage of the law of land use regulation, it will be the rare case concerned with the validity of use classification which will present an issue of sufficient constitutional involvement for purposes of the double appeal provision. See *Vickers v. Township Committee of Gloucester Township*, 37 N.J. 232, 234 (1962), *cert. denied* and appeal dismissed 371 U.S. 233, 83 S. Ct. 326, 9 L. Ed. 2d 495 (1963), and *Morris v. Postma*, 41 N.J. 354 (1964), where fundamental questions of the right to exclude common uses from an entire municipality were at stake. We recognize, of course, that new constitutional questions of substance may arise in a generally settled field of law. Also it should be noted that constitutional issues sufficient in the early development of a new area for such appeal purposes may become so settled through the course of judicial decisions as one day to become no longer worthy of a second review without leave. We conclude that cases falling into the type of this one are not appealable from the Appellate Division as of right."

It is submitted that the present state of the law of zoning is such that the issue of whether or not a particular zoning ordinance, as it affects a particular tract of land, is so arbitrary and unreasonable as to be confiscatory and, therefore, invalid is one for the courts of the state in which the matter arises and does not warrant intervention by the Supreme Court of the United States.

POINT II

The subject zoning ordinance, insofar as it pertains to respondents' tracts of land, is confiscatory and, therefore, invalid.

At 119 N.J. Super. 436, 292 A.2d 37, Superior Court of New Jersey, Appellate Division, in deciding the instant case, said:

> "We do not here suggest that fiscal considerations may not properly be given some weight in zoning. But we do aver that such considerations will not justify imposing substantial functional non-utilization of a property owner's lands. To do so is both confiscatory and to zone without 'due regard to the character of the district and its peculiar suitalibity for particular uses.' *Raskin v. Morristown*, 21 N.J. 180, 198 (1956). We are constrained to the conclusion that this is what has occurred here, and we find no substantial credible evidence to support the trial judge's finding to the contrary. Such zoning treatment of privately held lands is invalid. *Morris County Land, etc. v. Parsippany-Troy Hills Tp.*, 40 N.J. 539, 557 (1963); *Gruber v. Mayor and Tp. Com. of Raritan Tp.*, 39 N.J. 1, 12 (1962). The presumption of validity of the questioned provision of the ordinance has been satisfactorily overcome."

It has been well established by the Supreme Court of the United States, by the courts of New Jersey and by the courts of other states that zoning ordinances which impose "substantial functional non-utilization of a property owner's lands" are unreasonable and confiscatory and, therefore, invalid. In *Euclid v. Ambler Realty Co., supra*, page 8, Justice Sutherland, at 272 U.S. 395, 71 L. Ed. 314, pointed out that:

> "It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable."

See also *Nectow v. Cambridge, supra* page 8, in which a zoning ordinance so restricting a tract of land that no practical use could be made of it was set aside as unreasonable.

In *Brandon v. Montclair*, 124 N.J.L. 135, 11 A.2d 304 (Sup. Ct. 1940) *affirmed* 125 N.J.L. 367, 15 A.2d 598 (E. & A. 1940), a leading case in New Jersey, Justice Heher, speaking for the Court, at 124 N.J.L. 143, 11 A.2d 309, said:

> "It is not within the legislative province so to exercise the power as to preclude the use of the individual property for all purposes to which it is reasonably adapted. The statutory provision for relief against 'unnecessary hardship' ensuing from a 'literal' application of the ordinance was designed to permit reasonable use of the particular property, and thus to guard against an unwarranted interference with the fundamental right of property, *i.e.*, to secure reasonable zoning. A 'special exception' is, however, required to be 'in harmony with' the 'general purpose and intent of the ordinance. The phrase 'unnecessary hardship' takes special quality from the subsequent clause allowing a variance 'so that the spirit of the ordinance shall be observed and substantial justice done.' *R.S.* 1937, 40:55-36 40:55-39. The restrictions may be so unreasonable in the given case as to be confiscatory; and, in those circumstances, the general rule must be struck down as arbitrary and oppressive."

See also *United Advertising Corp. v. Maplewood*, 136 N.J.L. 336, 342, 56 A.2d 406, 410 (Sup. Ct. 1947); *Katobimar Realty Co. v. Webster*, 20 N.J. 114, 122; 118 A.2d 824, 828 (1955); Raskin v. Morristown, 21 N.J. 180, 197, 121 A.2d 378, 385 (1956); *Kozesnick v. Montgomery Twp.*, 24 N.J. 154, 182, 131 A.2d 1, 16 (1957); *Gruber v. Mayor and Tp. Com. of Raritan Tp.*, 39 N.J. 1, 12, 186 A.2d 489, 495 (1962); *Morris County Land, etc. v. Parsippany-Troy Hills Tp.*, 40 N.J. 539, 193 A.2d 232 (1963). In *Morris County Land, etc.* at 40 N.J. 556, 193 A.2d 242, Justice Hall, speaking for the Court, said:

> "We cannot agree with the trial court's thesis that, despite the prime public purpose of the zone regulations, they are valid because they represent local exercise of the police power in view of the nature of the area and because the presumption of validity was not overcome. In our opinion the provisions are clearly far too restrictive and as such are constitutionally unreasonable and confiscatory. As was said in *Kozesnik v. Montqomery Township*, 24 N.J. 154, 182 (1957): 'That a restraint against all use [for the benefit of another private land owner] is confiscatory and beyond the police power and statutory authorization is too apparent to require discussion' (insertion ours). *The same result ordinarily follows where the ordinance so restricts the use that the land cannot practically be utilized for any reasonable purpose or when the only permitted uses are those to which the property is not adapted or which are economically infeasible. Gruber v. Mayor and Township Committee of Raritan Township*, 39 N.J. 1, 12 (1962); *Arverne Bay Construction Co. v. Thatcher*, 278 N.Y. 222, 15 N.E. 2d 587, 117 A.L.R. 1110 (Ct. App. 1938). Judge Lehman's oft-quoted sentence in the latter case epitomizes the situation: 'The only substantial difference, in such case, between restriction and actual taking, is that the restriction

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> leaves the owner subject to the burden of payment of taxation, while outright confiscation would relieve him of that burden.' (15 N.E. 2d, at p. 592.)" (Emphasis supplied.)

For cases and authorities to the same effect in other states, see the leading case of *Arverne Bay Construction Co. v. Thatcher,* cited above by Justice Hall, and the cases cited and collected in the following texts: Rathkopf, *The Law of Zoning and Planning,* (1972 Edition) Volume 1, Chapter 6; Yokley, *Zoning Law and Practice* (Third Edition), Volume 1, § 2-1 at pages 53, 68 and in the 1972 Cumulative Supplement at page 13; Anderson, *American Law of Zoning* (1968 Edition), Volume 1, § 2.22 at page 93 and in the 1972 Cumulative Supplement at page 24 and McQuillan, *Municipal Corporations* (Third Edition) (1965 Revised Volume), Volume 8, § 25.45 at page 115 and in the 1972 Cumulative Supplement at page 20.

In the instant case, the unreasonable and confiscatory nature of the ordinance in question, as applied to respondents' lands, was made fully apparent to the Superior Court of New Jersey, Appellate Division. At 119 N.J. Super. 436, 292 A.2d 37, the Court said:

> "The opinions of the plaintiffs' experts outlined above are strongly buttressed by the history, amply portrayed in the record, leading to the adoption of these zoning amendments. This indicates that the governing body's adoption of the restriction here involved was designed to inhibit residential development in the municipality at a rate which would outstrip what the town fathers thought the voters and taxpayers would accept in fiscal outlay to supply ancillary municipal services (schools, etc.). It is implicit in the record that the 40,000 square foot restrictions imposed for the R-40 zones were believed to be effective for that purpose as not industrially acceptable to prospec-

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> tive builders. This appraisal has been borne out by the fact that there has been little or no development of homes on 40,000 square-foot lots since that restriction was first adopted by Freehold in 1965."

Under the circumstances, it is submitted that the Appellate Division properly held that "The presumption of validity of the questioned provision of the ordinance has been satisfactorily overcome," 119 N.J. Super. 437, 292 A.2d 37.

The Supreme Court of New Jersey saw no reason to disturb that result (Addendum page A1, and Addendum page A2).

CONCLUSION

For the reasons and in the light of the authorities hereinabove discussed and cited, it is respectfully submitted that the Petition for Writ of Certiorari in the matter should be denied.

Respectfully submitted,

/s/ William R. Blair, Jr.
WILLIAM R. BLAIR, JR.
Attorney for Respondents

ADDENDUM "A"

IN THE

SUPREME COURT OF NEW JERSEY

C-10 SEPTEMBER TERM 1972

FRANK SCHERE, et al.,
Plaintiffs-Petitioners,

vs.

TOWNSHIP OF FREEHOLD, et al.,
Defendants-Respondents.

Order Denying Petition for Certification
(Filed September 21, 1972)

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied, with costs.*

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 21st day of September, 1972.

A TRUE COPY

/s/ Florence R. Peskoe
Acting Clerk of the
Supreme Court

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* N.B. 12/6/72 called Mrs. Peskoe who advised costs would be only those in the Supreme Court.

ADDENDUM "B"

IN THE

SUPREME COURT OF NEW JERSEY

C-10 SEPTEMBER TERM 1972

FRANK SCHERE, et al.,
Plaintiffs-Petitioners,

vs.

TOWNSHIP OF FREEHOLD, et al.,
Defendants-Respondents.

Order Denying Appeal
(Filed September 21, 1972)

This matter having been duly presented to the Court, it is Ordered that the appeal is dismissed pursuant to Rule 2:12-9.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this 21st day of September, 1972.

A TRUE COPY

/s/ Florence R. Peskoe
Acting Clerk of the
Supreme Court